PROVIDING INFRASTRUCTURE FOR SMART GROWTH: LAND DEVELOPMENT CONDITIONS

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I. INTRODUCTION

Growth management has been an issue throughout the United States at least since the 1960s following the publication of Freidman's famous critique of low-density suburban expansion of urban areas into the surrounding rural countryside, *The Costs of Sprawl*.[1] Truth be told, although such "sprawl" had been taking place with the advent of the residential covenanted subdivision in the latter part of the nineteenth century the relative unaffordability of the single-family detached home on a comfortably-sized lot kept the "problem" to a minimum until the birth of the boom in such suburban expansion following World War II.[2] Soon, periodicals and journals of every stripe became filled with articles decrying and excoriating the costs of sprawl in terms of lost agricultural land and other open space and public facilities necessary to accommodate such growth.

1. REAL ESTATE RESEARCH CORP., THE COSTS OF SPRAWL (1974).

2. *See, e.g.*, HOWARD P. CHUDACOFF & JUDITH E. SMITH, THE EVOLUTION OF AMERICAN URBAN SOCIETY (6th ed., 2004).

In particular, government at every level struggled to provide adequate infrastructure—roads, water, sewer, schools, and parks—to accommodate the seemingly voracious demands of such rapid Greenfield development. While it had for decades been relatively common practice to require a subdivider to provide internal improvements as a condition for subdivision plat approval,[3] the ad valorem real property tax, even coupled with a share of state sales and income tax and federal block grants, proved inadequate for local government—on whom the responsibility fell—to cope with such public facility needs. As a result, local government turned to an expansion of developer-funded public facility provisions by means of required exactions, dedications and fees (impact and in-lieu), and land development conditions. These provisions were all sought to shoulder the major share of costs for such infrastructure or public facilities, primarily on the ground that it was the land developer which generated the need for such facilities in the first place.

Many states formalized this relationship through a variety of state statutes.[4] A variety of studies and proposed remedies for the issues surrounding growth management coalesced in the "smart growth" movement,[5] eventually adopted by the American Planning Association as the centerpiece of a comprehensive study followed by suggested legislation and ordinances designed to blunt the effect of growth's more deleterious effects.[6] Key to this effort and others remains the provision of adequate infrastructure to support such growth. Land development conditions have been and remain a critical part of the solution to growth, smart or otherwise. In a series of cases, the U.S. Supreme Court and appellate courts around the country have identified criteria for imposing such conditions and raised several issues that local government must address in passing the problem of

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3. ROBERT H. FREILICH & MICHAEL M. SHULTZ, MODEL SUBDIVISION REGULATIONS: PLANNING AND LAW: A COMPLETE ORDINANCE AND ANNOTATED GUIDE TO PLANNING PRACTICE AND LEGAL REQUIREMENTS (2d ed. 1995).

4. *See, e.g., infra* notes 186–87 and accompanying text.

5. "Smart Growth" is defined by the American Planning Association (APA) as "a collection of planning, regulatory, and development practices that use land resources more efficiently through compact building forms, infill development, and moderation in street and parking standards." *See* Stuart Meck, *Bringing Smart Growth to Your Community*, THE COMMISSIONER, Summer 2000, *available at*, http://www.planning.org/thecommissioner/summer00.htm. The APA further states that "[o]ne of its purposes is to reduce the outward spread of urbanization, protect sensitive lands, and, in the process, create true neighborhoods with a sense of community." *Id.*

6. *See, eg.*, GROWING SMART LEGISLATIVE GUIDEBOOK: MODEL STATUTES FOR PLANNING AND THE MANAGEMENT OF CHANGE (Stuart Meck ed., 2002); Stuart Meck, *Present at the Creation: A Personal Account of the APA Growing Smart Project*, LAND USE L. & ZONING DIG., Mar. 2002, at 3, 3–11; Meck, *supra* note 5.

funding such infrastructure to the land developer whose development drives the need for such infrastructure in the first place.

II. LAND DEVELOPMENT CONDITIONS

A. Introduction

Land development of any size and substance requires a variety of public facilities to support it. Most common is the need for additional roads, public utilities, parks, and schools. To this list, one could logically add police and fire stations, as well as sanitary landfills. The time is long past since government, particularly local government, has borne the principal burden of the costs of these facilities. State and local financial resources have been woefully inadequate at least since the end of massive federal subsidies in the early 1980s. For decades, local government has charged land developers with part of the cost for such public facilities, at least with respect to those facilities intrinsic to the development, in the form of subdivision dedications and fees. Initially "charged" as the price of drawing and recording the simpler and cheaper subdivision plat in place of the lengthy, tedious, and easily-flawed metes and bounds description for land development, these fees and dedications soon became part of the regulatory land use process, exercised by local government under the police power for the health, safety, and welfare of the people, often as a method to control or manage growth.[7]

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7. *See* ROBERT H. FREILICH, FROM SPRAWL TO SMART GROWTH: SUCCESSFUL LEGAL, PLANNING, AND ENVIRONMENTAL SYSTEMS (2000); JULIAN CONRAD JUERGENSMEYER & THOMAS E. ROBERTS, LAND USE PLANNING AND DEVELOPMENT REGULATION LAW (2d ed. 2003); EXACTIONS, IMPACT FEES AND DEDICATIONS: SHAPING LAND-USE DEVELOPMENT AND FUNDING INFRASTRUCTURE IN THE *DOLAN* ERA (Robert H. Freilich & David W. Bushek eds., 1995); DAVID L. CALLIES ET AL., CASES AND MATERIALS ON LAND USE 148 (3d ed. 1999) [hereinafter CALLIES ET AL., CASES AND MATERIALS ON LAND USE]; FREILICH & SHULTZ, *supra* note 3, at 1–6; DANIEL R. MANDELKER, LAND USE LAW (4th ed. 1997); Susan P. Schoettle & David G. Richardson, *Nontraditional Uses of the Utility Concept to Fund Public Facilities*, 25 URB. LAW. 519, 519–22 (1993); Frona M. Powell, *Challenging Authority for Municipal Subdivision Exactions: The Ultra Vires Attack*, 39 DEPAUL L. REV. 635, 635–36 (1990); Julian Conrad Juergensmeyer & Robert Mason Blake, *Impact Fees: An Answer to Local Government's Capital Funding Dilemma*, 9 FLA. ST. U. L. REV. 415 (1981); Thomas M. Pavelko, *Subdivision Exactions: A Review of Judicial Standards*, 25 WASH. U. J. URB. & CONTEMP. L. 269 (1983); DEVELOPMENT EXACTIONS (James E. Frank & Robert M. Rhodes eds., 1987).

The British also continue to experiment with land development conditions. *See, e.g.*, Tom Cornford, *Planning Gain and the Government's New Proposals on Planning Obligations*, 2002 J. PLAN. & ENVTL. L. 796; David L. Callies & Malcolm Grant, *Paying for Growth and Planning Gain: An Anglo-American Comparison of Development Conditions, Impact Fees and Development Agreements*, 23 URB. LAW. 221 (1991).

However, by justifying such land development dedications and fees as police power regulations rather than "voluntary" costs of using the subdivision process, local governments invite judicial scrutiny under the Takings Clause of the Fifth Amendment to the U.S. Constitution, which permits the taking of private property for public use only upon payment of just compensation.[8] While early cases, by and large, upheld such intrinsic dedications and fees, the more recent charges of "impact fees" for the shared construction by several land developments of large and expensive public facilities (such as municipal wastewater treatment plants and sanitary landfills), outside or extrinsic to the development upon which the fee is levied, led knowledgeable courts to scrutinize the connection between these fees and the need generated by the charged development for the particular facility in question.[9] Nevertheless, it is generally agreed that the law applicable to impact fees, exactions, and in lieu fees, as well as to compulsory dedications, is the same, given that they all represent land development conditions levied at some point in the land development process, such as subdivision plat approval, shoreline management permit, building permit, occupancy permit, or utility connection.[10] Therefore, except where the test specifically makes such distinctions, the terms are used interchangeably.

The major legal issue with respect to fees, dedications, and exactions, is the connection or "nexus" to the land development. Without this connection or "nexus," such land development regulations are generally unconstitutional takings of property without compensation, particularly after the U.S. Supreme Court decisions in *Nollan v. California Coastal Commission*,[11] and *Dolan v. City of Tigard*.[12] Therefore, much of part II is devoted to these cases and their progeny.

Critical as the takings/nexus issue is, there are additional legal requirements for attaching conditions to the development of land. Among these are the need for authority to levy such dedications, fees, and other exactions, in the form of enabling legislation and local ordinances, to avoid the charge that they are "ad hoc," and the need to

8. *See* U.S. CONST. amend. V.

9. Ira Michael Heyman & Thomas K. Gilhool, *The Constitutionality of Imposing Increased Community Costs on New Suburban Residents Through Subdivision Exactions*, 73 YALE L.J. 1119 (1964); *see also* John D. Johnston, Jr., *Constitutionality of Subdivision Control Exactions: The Quest for a Rationale*, 52 CORNELL L. REV. 871 (1967).

10. *See* Bd. of County Comm'rs v. Bainbridge, Inc., 929 P.2d 691, 698–99 (Colo. 1996); *see also* DEVELOPMENT EXACTIONS, *supra* note 7, at 3–4.

11. 483 U.S. 825 (1987).

12. 512 U.S. 374 (1994). For recent commentary, see J. David Breemer, *The Evolution of the "Essential Nexus" Test: How State and Federal Courts Have Applied* Nollan *and* Dolan *and Where They Should Go from Here*, 59 WASH. & LEE L. REV. 373 (2002).

expend the fee, whether "in lieu" of a dedication requirement or an impact fee, within a reasonable period of time after collection. As the history and cases have made abundantly clear, such land development conditions are development driven; that is, to be valid, they must be collected (and exactions and dedications required) for, and only for, public facilities and infrastructure for which land development causes a need.[13] Courts uniformly strike down—usually as an unauthorized tax—land development conditions that are not so connected. Generally, this includes attempts to remedy existing infrastructure deficiencies,[14] or to provide for operation and maintenance of facilities.[15]

Of course, if payment for a public facility, or its construction or dedication, is in part fulfillment of a landowner's contractual obligations under a development agreement between landowner and local government, then the legal issues and analysis are entirely different; consequently, the need for nexus and proportionality, at least as a matter of constitutional law, disappears.[16]

B. Nexus, Proportionality, and Takings

A land use regulation or action must not be so unduly restrictive that it causes a "taking" of a landowner's property without just compensation.[17] The Fifth Amendment to the U.S. Constitution states, in part, "nor shall private property be taken for public use, without just compensation."[18]

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13. James C. Nicholas, *Impact Exactions: Economic Theory, Practice, and Incidence*, L. & Contemp. Probs., Winter 1987, at 85; JAMES C. NICHOLAS, ARTHUR C. NELSON & JULIAN CONRAD JUERGENSMEYER, A PRACTIONER'S GUIDE TO DEVELOPMENT IMPACT FEES 37–38 (1991); TAKINGS: LAND DEVELOPMENT CONDITIONS AND REGULATORY TAKINGS AFTER *DOLAN* AND *LUCAS* (David L. Callies ed., 1996).

14. Marblehead v. City of San Clemente, 277 Cal. Rptr. 550 (Cal. Ct. App. 1991) ("[The] defect affects the entire measure [and] the initiative's severance clause c[ould not] be used to save any part of it").

15. Bloom v. City of Fort Collins, 784 P.2d 304, 311 (Colo. 1989) ("[T]he transfer provision in section 108A-13 c[ould] be effectively severed from the remainder of the ordinance, and, when so severed, the remaining parts of the ordinance c[ould] be implemented in accordance with the stated legislative purpose of 'providing maintenance and upkeep of the city's local streets and related facilities.'") (citation omitted).

16. Callies & Grant, *supra* note 7, at 239–50.

17. Goldblatt v. Hempstead, 369 U.S. 590, 594–95 (1962).

18. *See also* CAL. CONST. art. I, § 19. For an excellent overview of both federal and California takings law, see Justice Mosk's majority opinions in *Landgate, Inc. v. California Coastal Comm'n*, 17 Cal. Rptr. 2d 841 (Cal. 1998), and in *Santa Monica Beach, Ltd. v. Superior Court*, 81 Cal. Rptr. 2d 93 (Cal. 1999). *See also* Garneau v. City of Seattle, 147 F.3d 802 (9th Cir. 1998); TAKING SIDES ON TAKINGS ISSUES: PUBLIC AND PRIVATE PERSPECTIVES (Thomas E. Roberts ed., 2002).

1. Federal Constitutional Standard

While much of the recent case law dealing with such conditions and exactions has developed from challenges to the impact fee, the language is applicable to all three. To be enforceable and valid, an impact fee must be levied upon a development to pay for public facilities, the need for which is generated, at least in part, by that development.[19] This so-called "rational nexus" test, developed by the courts in Florida and other jurisdictions, considers such fees and exactions.[20] First proposed in 1964,[21] it became the national standard by the end of the 1970s.[22]

The test essentially has two parts. First, the particular development must generate a need to which the amount of the exaction bears some rough proportionate relationship. Second, the local government must demonstrate that the fees levied will actually be used for the purpose stated.[23]

This test was confirmed and made applicable to all land development conditions by a decision of the U.S. Supreme Court in 1987. Decided on the last day of the Court's 1987 term, *Nollan v. California Coastal Commission* deals ostensibly with beach access.[24] There, property owners sought a coastal development permit from the California Coastal Commission to tear down a beach house and build a bigger one. The Commission granted the permit only upon condition that the owner give the general public the right to walk across the owner's backyard beach area, an easement over one-third of the lot's total area. The purpose, the Commission said, was to pre-

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19. David L. Callies, *Impact Fees, Exactions and* Paying for Growth in Hawaii, 11 U. Haw. L. Rev. 295 (1989) (report review) [hereinafter Callies, *Impact Fees*]; Brian W. Blaesser & Christine M. Kentopp, *Impact Fees: The "Second Generation,"* 38 WASH. U. J. URB. & CONTEMP. L. 55 (1990); CALLIES ET AL., CASES AND MATERIALS ON LAND USE, *supra* note 7, ch. 4.

20. *See, e.g.*, Hernando County v. Budget Inns of Fla., Inc., 555 So. 2d 1319 (Fla. Dist. Ct. App. 1990); Frisella v. Town of Farmington, 550 A.2d 102 (N.H. 1988); Baltica Constr. Co. v. Planning Bd. of Franklin Twp., 537 A.2d 319 (N.J. Sup. Ct. App. Div. 1988); Batch v. Town of Chapel Hill, 387 S.E.2d 655 (N.C. 1990); Unlimited v. Kitsap County, 750 P.2d 651 (Wash. Ct. App. 1988).

21. Heyman & Gilhool, *supra* note 9; *see also* Fred P. Bosselman & Nancy Stroud, *Legal Aspects of Development Exactions*, *in* DEVELOPMENT EXACTIONS 70 (James E. Frank & Robert M. Rhodes eds., 1987) [hereinafter Bosselman & Stroud, *Legal Aspects*].

22. *See* Bosselman & Stroud, *Legal Aspects*, *supra* note 21, at 74.

23. Fred P. Bosselman & Nancy E. Stroud, *Mandatory Tithes: The Legality of Land Development Linkage*, 9 NOVA. L.J. 381, 397–99 (1985) [hereinafter Bosselman & Stroud, *Mandatory Tithes*]; *see also* Holmdel Builders Ass'n v. Twp. of Holmdel, 583 A.2d 277 (N.J. 1990).

24. 483 U.S. 825 (1987).

serve visual access to the water, which was impaired by the much bigger beach house. The Court, however, held that, assuming the commission's purpose to overcome the psychological barrier to the beach created by overdevelopment was a valid one, it could not accept that there was any *nexus* between these interests and the public lateral access or easement condition attached to the permit.[25]

However, the Court said, it is an altogether different matter if there is an "essential nexus" between the condition and what the landowner proposes to do with the property.[26]

There are several important factors for local governments to consider in levying impact fees:

1. The fees must generally be charged as part of the land *development* process, not the land reclassification or rezoning process. Fees are development driven, and land reclassification, while it may well be a prelude to development, does not create any need for public facilities whatsoever.[27]

2. Collected fees do not belong in the general fund, or once again the need becomes questionable.

3. The fees cannot be kept by government for years and years, for the same reason stated in number 2 above.

Ignoring the foregoing raises a presumption as a matter of both law and policy that the impact fee is nothing more than a revenue-raising device, either for a facility that has nothing to do with the land development upon which the fee is raised, or for undetermined fiscal purposes generally. In either case, the "fee" is then presumed to be a tax. This characterization as a tax is almost always fatal to an impact fee, since most local governments have very little specific authority to tax beyond the property tax and, occasionally, a sales or income

25. *Id.* at 838–39. For a full discussion, see Callies & Grant, *supra* note 7.

26. 483 U.S. at 836–37; *see also* Bosselman & Stroud, *Mandatory Tithes*, *supra* note 23; Callies, *Impact Fees*, *supra* note 19; Brenda Valla, *Linkage: The Next Stop in Developing Exactions*, 2 Growth Management Studies Newsletter 4 (June 1987); Jerold S. Kayden & Robert Pollard, *Linkage Ordinances and Traditional Exactions Analysis: The Connection Between Office Development and Housing*, L. & CONTEMP. PROBS., Winter 1987, at 127; Rachelle Alterman, *Evaluating Linkage and Beyond: Letting the Windfall Capture Genie Out of the Bottle*, 34 WASH. U. J. URB. & CONTEMP. L. 3 (1988); CALLIES ET AL., CASES AND MATERIALS ON LAND USE, *supra* note 7. *But see Holmdel Builders Ass'n*, 583 A.2d 277 (upholding impact fees for housing as functional equivalents of mandatory set-asides, which the court had already approved under New Jersey's constitutionally based "fair share" doctrine).

27. Although such fees are charged in California when land is rezoned to a planned unit development, a special zone in most jurisdictions, it often carries with it developmental rights.

tax. Since an impact fee is none of the above, and since all local government taxes must be supported by specific statutory authority, the fee is almost always declared illegal.[28]

The *Nollan* Court did not discuss the required degree of connection between the exaction imposed and the projected impacts of the proposed development. This issue was left open until the U.S. Supreme Court's 1994 decision in *Dolan v. City of Tigard*.[29] In this landmark 5-4 decision, the Court held for the first time that a city must demonstrate a relationship between the conditions imposed on a development permit and the development's impact.[30]

Florence Dolan owned a plumbing business and electrical supply store located in the business district of Tigard, Oregon, along Fanno Creek, which flowed through the "southwestern corner of the lot and along its western boundary."[31] Dolan applied to the city for a building permit to double the size of the store and pave the 39-space parking lot. To mitigate the effects of increased runoff from her property that would result from her expansion plans, the city planning commission required that Dolan dedicate to the city the portion of her property lying within the 100-year flood plain along Fanno Creek for a public greenway. To reduce the impact of increased traffic and congestion caused by an increase in visitors to her store, the commission also required that Dolan dedicate an additional 15-foot strip of land adjacent to the flood plain as a public pedestrian/bicycle pathway.[32]

In *Dolan*, the Supreme Court added a second test beyond "nexus": whether the degree or amount of the exactions demanded by the city's permit conditions were sufficiently related to the projected impact of the development proposed. The Court coined the term "rough proportionality" to describe the required relationship between the exactions and the projected impact of the proposed development.[33] The Court then stated "[n]o precise mathematical calculation is required, but the city must make some sort of

28. *See, e.g.*, Town of Longboat Key v. Lands End, Ltd., 433 So. 2d 574 (Fla. Dist. Ct. App. 1983); Lafferty v. Payson City, 642 P.2d 376 (Utah 1982); Home Builders Ass'n of Central Arizona, Inc. v. Riddel, 510 P.2d 376 (Ariz. 1973); Juergensmeyer & Blake, *supra* note 7.

29. Dolan v. City of Tigard, 512 U.S. 374 (1994).

30. *Id.* at 390–91.

31. *Id.* at 378.

32. *Id.* at 379–80.

33. *Id.* at 391. After coining the term "rough proportionality," the Court, in its majority opinion, never used that term again when it applied its decision to the facts; instead, it continued to use the words "required reasonable relationship" or "reasonably related." *Id.* at 394–95. Notably, the Court rejected stricter standards as the constitutional norm. *Id.* at 389–90; *see also* Herron v. Mayor & City Council of Annapolis, 388 F. Supp. 2d 565, 570–71 (D. Md. 2005).

is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development."[34]

The Court reviewed the exactions (the required dedications of the public greenway and the pedestrian/bicycle pathway) and found that the city had not met its burden of demonstrating the required proportionality.

Together, *Nollan* and *Dolan*[35] require that to pass constitutional muster, land development conditions imposed by government

1. Must seek to promote a legitimate state interest;

2. Must be related to the land development project upon which they are being levied by means of a rational or essential nexus;

3. Must be proportional to the need or problem which the land development project is expected to cause, and the project must accordingly benefit from the condition imposed.

Under the first standard, legitimate state interest, an agency may only require a landowner to dedicate land (or interests in land) or contribute money for public projects and purposes, such as public facilities, and in most jurisdictions, public housing.[36]

Under the second standard, essential nexus, an agency must find a close connection between the need or problem generated by the proposed development and the land or other exaction or fee required from the landowner/developer. Thus, for example, a residential development will in all probability generate a need for public schools and parks. A shopping center or hotel in all probability will not. Both will generate additional traffic and therefore generate a need for more streets and roads.

Under the third standard, proportionality, a residential development of, say, three hundred units may well generate a need for additional classroom space, but almost certainly not a new school or school

34. *Dolan*, 512 U.S. at 391.

35. The U.S. Supreme Court has recently reaffirmed the applicability of *Nollan* and *Dolan* despite invalidating the "substantially advances" formula of identifying regulatory takings that was drawn upon in the Court's analysis in the *Nollan* decision. *See* Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 545–48 (2005).

36. Although *Lingle v. Chevron* did away with the "substantially advances a legitimate state interest test" in traditional Fifth Amendment regulatory taking cases, there is little evidence it meant to do so in "unconstitutional conditions like *Nollan* and *Dolan*. For a full discussion, see D. Callies & C. Goodin, J. MARSHALL L. REV. (*forthcoming* 2007), and R.S. Radford, *Just a Flesh Wound? The Impact of* Lingle v. Chevron *on Regulatory Takings Law*, 38 URB. LAW. 437 (2006).

site. On the other hand, such a residential development of several thousand units would, when constructed, likely generate a need for a new school and school site, depending upon the demographics of the new residents.

2. Applicability of *Nollan* and *Dolan* to Land Development Conditions Generally

A number of courts have struck down land development conditions for failure to comply with *Nollan*'s and *Dolan*'s three-part test. An excellent example is the Eighth Circuit's decision in *Christopher Lake Development Co. v. St. Louis County*,[37] in which the court applied *Dolan* to strike down a county drainage system requirement.[38] The county granted the owner of forty-two acres preliminary development approval for two residential communities on the condition that the owner provide a drainage system for an entire watershed. Citing *Nollan* for the nexus test, the court opined that "[a]lthough the County's objective to prevent flooding may be rational, it may not be rational to single out the Partnership to provide the entire drainage system."[39] The court then found such a requirement disproportionate to the drainage problems resulting from the proposed development:

> [F]rom our review of the record, the County has forced the Partnership to bear a burden that should fairly have been allocated throughout the entire watershed area. "A strong public desire to improve the public condition will not warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."[40]

Concerning the remedy, the court said, "[w]e believe that the Partnership is entitled to recoup the portion of its expenditures in excess of its pro rata share and remand to the district court to determine the details and amounts."[41]

An even more egregious case is *Walz v. Town of Smithtown*.[42] There, landowners were denied access to the public water supply when they refused to deed the front fifteen feet of their property to

37. 35 F.3d 1269 (8th Cir. 1994).
38. *Id.* at 1274–75.
39. *Id.* at 1274.
40. *Id.* at 1275 (quoting Dolan v. City of Tigard, 512 U.S. 374, 396 (1994)).
41. *Id.*
42. 46 F.3d 162 (2d Cir. 1995).

Smithtown for road-widening purposes.[43] Finding a total lack of nexus between water service and road widening, the court found that "[a]s landowners, the Walzes surely had a right not to be compelled to convey some of their land in order to obtain utility service."[44]

Lack of proportionality between the exaction and the problem it is meant to solve is the basis for other courts to nullify exactions. In *Steel v. Cape Corp.*, a Maryland appellate court held unconstitutional the board's denial of a developer's rezoning application based on the inadequacy of school facilities in the community.[45] The court cited *Dolan* and *Nollan*: "While the provision of public facilities is a legitimate concern of the County, the burden of providing adequate schools is disproportionately placed upon Cape Corporation when residential use is denied to them while being granted to its neighbors."[46] Similarly, in *Burton v. Clark County*,[47] the Court of Appeals of Washington court of appeals held that while a road dedication requirement for a three-lot subdivision met the nexus test, there was no evidence to sustain a finding of rough proportionality.[48] As the court noted: "[T]he government may not use the permitting process as a vehicle for solving public problems not created or exacerbated by *any* project."[49]

Substantially further afield is the application of *Dolan* in *Manocherian v. Lenox Hill Hospital*,[50] in which the New York Court of Appeals struck down a rent stabilization statute in part because it did not advance "a closely and legitimately connected State interest."[51] Citing both the *Dolan* and *Nollan* cases, the court said that "the Supreme Court refrained from placing any limitations or distinctions or classifications on the application of the 'essential nexus' test."[52]

In *Homebuilders Ass'n of Dayton and the Miami Valley v. City of Beavercreek*,[53] the court adopted a nexus and proportionality standard to examine the validity of a road impact fee ordinance. Specifically, the city had to "demonstrate that there [was] a reasonable relationship between the city's interest in constructing new roadways and the

43. *Id.* at 164–65.

44. *Id.* at 169; *see also* Art Piculell Group v. Clackamas County, 922 P.2d 1227, 1233 (Or. Ct. App. 1996); Nielsen v. Merriam, No. 40106-8-I, 1998 WL 390442, at *2 (Wash. Ct. App. July 13, 1998) (holding that there was no nexus between a county-required easement and any problems created by a proposed subdivision).

45. 677 A.2d 634 (Md. Ct. Spec. App. 1996).

46. *Id.* at 650.

47. 958 P.2d 343 (Wash. Ct. App. 1998).

48. *Id.* at 356–57.

49. *Id.* at 354 n.42 (emphasis in original).

50. 643 N.E.2d 479 (N.Y. 1994).

51. *Id.* at 480.

52. *Id.* at 483 (citation omitted) (citing Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 834 (1987)).

53. 729 N.E.2d 349 (Ohio 2000).

increase in traffic generated by new developments." If a reasonable relationship was found to exist, it had to then demonstrate "that there [was] a reasonable relationship between the impact fee imposed by Beavercreek and the benefits accruing to the developer from the construction of new roadways."[54] The ordinance passed this test and was upheld.[55]

In *Town of Flower Mound v. Stafford Estates Ltd.*, the town conditioned its approval of the development of a residential subdivision on the developer's rebuilding an abutting road.[56] The court initially noted that "conditioning government approval of a development of property on some exaction [was] a compensable taking unless the condition (1) [bore] an essential nexus to the substantial advancement of some legitimate government interest and (2) [was] roughly proportional to the projected impact of the proposed development."[57] The Texas Supreme Court opined that the "[t]own . . . failed to relate discounted traffic impact fees to the impact of developments on traffic."[58] "[C]onditioning development on rebuilding [a] [r]oad with concrete and making other changes was simply a way for the [t]own to extract from [the developer] a benefit to which the town was not entitled. . . . The exaction . . . was [declared] a taking for which [the developer was] entitled to compensation."[59]

In *Isla Verde International Holdings, Inc. v. City of Camas*,[60] the court struck down a thirty percent open-space dedication requirement on a fifty-one lot subdivision approval, while upholding a road dedication requirement for emergency vehicles in absence of evidence concerning the cost of the road and its effects on the subject property.[61] In *Reynolds v. Inland Wetlands Commission of Trumbull*,[62] the court struck down a requirement that the landowner grant a conservation easement over three of his lots as a condition of developing a fourth lot, in part on the ground that such a condition would not pass a "nexus" test.[63] In *Amoco Oil Co. v. Village of Schaumburg*,[64] the court struck down a road widening dedication, holding that the taking of twenty percent of Amoco's land for roadway widening purposes on the

54. *Id.* at 356.
55. *Id.* at 356–58.
56. 135 S.W.3d 620 (Tex. 2004).
57. *Id.* at 634.
58. *Id.* at 644.
59. *Id.* at 645.
60. 990 P.2d 429 (Wash. Ct. App. 1999).
61. *Id.*
62. No. 309721, 1996 WL 383363 (Conn. Super. Ct. June 10, 1996).
63. *Id.* at *2.
64. 661 N.E.2d 380 (Ill. App. Ct. 1995).

basis of a .4 percent increase in traffic caused by the proposed development "does not correspond with the slightest notions of rough proportionality."[65]

In *St. Johns County v. Northeast Florida Builders Ass'n*,[66] the court held that a fee of $448 per single-family dwelling met the rational nexus test when applied to a 100-unit subdivision but failed a proportionality standard because it was not clear that the money collected would necessarily benefit those who paid the fee.[67] In *Volusia County v. Aberdeen at Ormond Beach, L.P.*,[68] the same court held that a school impact fee as applied to a retirement community failed the rational nexus test because the community was subject to covenants prohibiting minors from residing there.[69] In *Everett School District No. 2 v. Mastro*,[70] the Court of Appeals of Washington upheld a school impact mitigation fee based on the average number of students in 869 apartments in twenty-five buildings as a condition for the issuance of a building permit for an apartment complex.[71] The court noted with approval that the fee calculation provided for no impact from "studio apartments and [was] based on the exact number of one and two bedroom apartments in the complex."[72]

Of course, exactions and dedications may well be proper, assuming they meet the nexus and proportionality tests, if they are attached to land development permits of some kind. There are literally dozens of pre-*Nollan/Dolan* cases upholding various impact fees and exactions for roads, sewers, water, and housing where at least the nexus standard later imposed by the U.S. Supreme Court appears to have

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65. *Id.* at 391; *see also* Schultz v. City of Grants Pass, 884 P.2d 569 (Or. Ct. App. 1994) (striking down a road dedication); Timber Trails Corp. v. Planning & Zoning Comm'n of Sherman, No. 272170, 1992 WL 239100 (Conn. Super. Ct. Sept. 16, 1992) (striking down a road dedication); Prop. Group, Inc. v. Planning Comm'n of Tolland, 628 A.2d 1277 (Conn. 1993) (striking down a road widening dedication); Lexington-Fayette Urban County Gov't v. Schneider, 849 S.W.2d 557 (Ky. Ct. App. 1992) (striking down bridge dedication requirement); Cobb v. Snohomish County, 829 P.2d 169 (Wash. Ct. App. 1991) (striking down a road improvement fee); Dellinger v. City of Charlotte, 441 S.E.2d 626 (N.C. Ct. App. 1994) (striking down a road dedication requirement); Castle Homes & Dev. v. City of Brier, 882 P.2d 1172 (Wash. Ct. App. 1994) (striking down a per-lot road impact fee); McClure v. City of Springfield, 28 P.3d 1222, 1227 (Or. Ct. App. 2001) (invalidating a sidewalks and "clipped corners" exaction in the absence of specific findings explaining how these exactions were "relevant or proportional" to the city's interest in safe streets at the location of the proposed development).

66. 583 So. 2d 635 (Fla. 1991).

67. *Id.* at 639.

68. 760 So. 2d 126 (Fla. 2000).

69. *Id.* at 136.

70. No. 42835-7-I, 1999 WL 674782 (Wash. Ct. App. Aug. 30, 1999).

71. *Id.* at *6.

72. *Id.*

been met. For a comprehensive list of such cases, see *City of Annapolis v. Waterman.*[73]

3. Impact Fees

What if a city or other local agency requires payment of an impact fee or imposes some other sort of development condition not requiring the dedication of land? Does the *Nollan/Dolan* nexus test apply? *Benchmark Land Co. v. City of Battle Ground*[74] adds to the growing consensus that the so-called "heightened scrutiny" applicable to dedications also applies to monetary fees and exactions. There, a developer successfully challenged a city condition of subdivision plat approval requiring half-street improvements to a street adjoining, but extrinsic, to the proposed development, "based upon the length of the development adjoining the street."[75] "[T]he subdivision did not directly access the street" subject to the improvements.[76] The court held that such a condition met neither the essential nexus test nor the requirement of rough proportionality, and so was an unconstitutional land development condition.[77]

A year later, the Washington Court of Appeals reconsidered the case following the U.S. Supreme Court's decision in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*[78] In that case, the Court said that it had never applied the "heightened scrutiny" standard from *Nollan/Dolan* beyond a land dedication.[79] Nevertheless, the Washington Court of Appeals found that the *Dolan* rough proportionality test still applied; because the city required the developer to pay for something outside the relevant property to address a problem not caused by the new development, the condition was invalid.[80] "Surely if the issues for an exaction of money are the same as for an exaction of land,

73. 745 A.2d 1000, 1009 (Md. 2000) (listing types of conditions that have been upheld as constitutional, although the decision itself is badly flawed and demonstrates a misunderstanding of takings and exactions law).

74. 972 P.2d 944 (Wash. Ct. App. 1999).

75. *Id.* at 949.

76. *Id.* at 946.

77. *Id.* at 950–51.

78. Benchmark Land Co. v. City of Battle Ground, 14 P.3d 172, 173 (Wash. Ct. App. 2000) (citing City of Monterey v. Del Monte Dunes, 526 U.S. 687 (1999)).

79. *Del Monte Dunes*, 526 U.S. at 703.

80. *Id.*

the test must be the same: a showing of 'nexus' and 'proportionality.'"[81]

Applying a different and stricter test, the U.S. District Court for the Eastern District of Illinois held that a street improvement fee violated the State's constitution because it was not specifically "attributable to the new development" for which it was charged.[82] In that case, two developers paid fees, under protest, for timely final plat recordings of their subdivision plats. The court found that Bolingbrook did not meet its burden of showing that the impact fees for the cost of future or recent improvements of existing or proposed streets were significantly attributable to the specific developments.[83]

The California Supreme Court answered this question differently in *Ehrlich v. City of Culver City*.[84] The *Ehrlich* court held that if a city bases a development or impact fee on an ordinance or rule of general applicability, the fee will be within the city's police power and will not be subject to the heightened constitutional scrutiny of the *Nollan/Dolan* nexus test. However, if an impact fee is adjudicatively imposed on an individual property owner, it will be subject to heightened scrutiny under the *Nollan/Dolan* test.

Following the *Ehrlich* decision, the Texas Supreme Court in *Town of Flower Mound v. Stafford Estates Ltd.*,[85] agreed that at least the *Dolan* test for proportionality should apply to both dedicatory and non-dedicatory exactions. There the court stated:

> We agree with the Supreme Court of California's decision in *Ehrlich*. For purposes of determining whether an exaction as a condition of government approval of development is a compensable taking, we see no important distinction between a dedication of property to the public and a requirement that property already owned by the public be improved. The *Dolan* standard should apply to both.[86]

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81. *Benchmark*, 14 P.3d at 175. For commentary agreeing that the *Del Monte Dunes* decision does not foreclose heightened scrutiny to fees and exactions beyond dedication of land, see Bruce W. Bringardner, *Exactions, Impact Fees and Dedications: National and Texas Law After* Dolan *and* Del Monte Dunes, 32 URB. LAW. 561 (2000).

82. Chicago Title Ins. Co. v. Vill. of Bolingbrook, No. 97-C-7055, 1999 WL 65054, at *8 (N.D. Ill. Feb. 5, 1999) (internal punctuation omitted), vacated, No. 97-C-7055, 1999 WL 259952 (N.D. Ill. Apr. 6, 1999).

83. *Id.* at *10.

84. 911 P.2d 429 (Cal. 1996). The Supreme Court of California recently reaffirmed the *Ehrlich* approach in *San Remo Hotel, L.P. v. City & County of San Francisco*, 41 P.3d 87, 104 (Cal. 2002).

85. 135 S.W.3d 620 (Tex. 2004).

86. *Id.* at 639–40.

Other courts, on the other hand, have specifically applied *Nollan/Dollan* beyond dedications to monetary exactions. For example, the Ninth Circuit Court of Appeals, in *Garneau v. City of Seattle*,[87] held that the *Nollan/Dollan* doctrine could be applied to non-physical dedications; however the doctrine was found inapplicable in that specific case for other reasons.[88] While noting that the case before it was not appropriate for setting out precise rules, an Oregon appellate court held in *Clark v. City of Albany*,[89] that "the fact that *Dolan* itself involved conditions that required a dedication of property interests does not mean that it applies *only* to conditions of that kind."[90]

4. Legislative Decisions

In its broadest context, as noted by Justice Thomas in his dissent from a denial of a petition for certiorari in *Parking Ass'n of Georgia, Inc. v. City of Atlanta*,[91] "[t]he lower courts are in conflict over whether *Dolan's* test for property regulation should be applied in cases where the alleged taking occurs through an Act of the legislature."[92] After citing, inter alia, *Trimen Development Co. v. King County*[93] and *Manocherian v. Lenox Hill Hospital*,[94] Justice Thomas observed the following:

> It is not clear why the existence of a taking should turn on the type of governmental entity responsible for the taking. A city council can take property just as well as a planning commission can. Moreover, the general applicability of the ordinance should not be relevant in a takings analysis. . . . The distinction between sweeping legislative takings and particularized administrative takings appears to be a distinction without a constitutional difference.[95]

However, many courts have ruled to the contrary, and have not applied the *Dolan* test to legislative decisions. In *Home Builders Ass'n of Central Arizona v. City of Scottsdale*,[96] the Arizona Supreme Court

87. 147 F.3d 802 (9th Cir. 1998).
88. *Id.* at 809–11.
89. 904 P.2d 185 (Or. Ct. App. 1995).
90. *Id.* at 189 (emphasis in original).
91. 515 U.S. 1116 (1995).
92. *Id.* at 1117 (Thomas, J., & O'Connor, J., dissenting from denial of certiorari).
93. 877 P.2d 187 (Wash. 1994).
94. 643 N.E.2d 479 (N.Y. 1994).
95. *Parking Ass'n of Georgia, Inc.*, 515 U.S. at 1117–18.
96. 930 P.2d 993 (Ariz. 1997).

specifically refused to apply any heightened scrutiny to Scottsdale's water resource development fee, deciding that *Nollan/Dolan* was inapplicable to generally legislative fees of this type.[97] In *Texas Manufactured Housing Ass'n v. City of Nederland*, the Fifth Circuit also declined to apply such scrutiny to a challenge to a general zoning ordinance prohibiting trailer coaches on any lot in the city except trailer parks.[98]

Other cases are less easy to explain and more clearly follow the Arizona court in *City of Scottsdale*.[99] In *Arcadia Development Corp. v. City of Bloomington*,[100] the Court of Appeals of Minnesota refused to apply *Nollan/Dolan* to a requirement that "mobile home park owners who close their parks . . . pay relocation costs to park residents,"[101] on the ground that as a city-wide ordinance, a legitimate government interest test, rather than a rough proportionality test, applied.[102] Likewise, in *Spinell Homes, Inc. v. Municipality of Anchorage*,[103] the Supreme Court of Alaska declined to apply *Nollan/Dolan* to predetermined municipal subdivision dedication requirements that applied city-wide, as a condition to granting building permits.[104]

While not nearly so definite, the Supreme Judicial Court of Maine "assign[ed] weight to the fact that the easement requirement derives from a legislative rule of general applicability and not an ad hoc determination" in *Curtis v. Town of South Thomaston*.[105] It nevertheless did apply a rough proportionality test in determining the fee was a valid exercise of the police power.[106] Therefore, the use of an impact fee statute coupled with an ordinance may increase considerably the likelihood that a court will apply less than the heightened security, which *Nollan/Dolan* require. Hawaii has such a statute.[107] On

97. *Id.* at 999–1000; *see also* GST Tucson Lightwave, Inc. v. City of Tucson, 949 P.2d 971, 978 (Ariz. Ct. App. 1997) (deciding that *Nollan/Dolan* was inapplicable to a "franchise or license issued by a municipality to use public rights-of-way").

98. 101 F.3d 1095, 1105 (5th Cir. 1996).

99. In some jurisdictions, subdivision exactions found in a generally applicable subdivision statute have been held to fall outside *Nollan/Dolan*. *See* Marshall v. Bd. of County Comm'rs, 912 F. Supp. 1456, 1471–74 (D. Wyo. 1996); *see also* Home Builders Ass'n of Dayton v. City of Beavercreak, Nos. 94-CV-0012, 94-CV-0062, 1996 WL 812607, at **17–18 (Ohio Ct. C.P. Feb. 12, 1996) (citing *City of Scottsdale*, 930 P.2d 993); Harris v. City of Wichita, 862 F. Supp. 287, 294 (D. Kan. 1994) ("*Dolan's* rough proportionality test does not apply to this case."); Wonders v. Pima County, 89 P.3d 810 (Ariz. Ct. App. 2004).

100. 552 N.W.2d 281 (Minn. Ct. App. 1996).

101. *Id.* at 283.

102. *Id.* at 283, 286.

103. 78 P.3d 692 (Alaska 2003).

104. *Id.* at 702.

105. 1998 ME 63, ¶ 7, 708 A.2d 657, 660 (Me. 1998).

106. *Id.*

107. *See* HAW. REV. STAT. ANN. § 46-142 (LexisNexis 2003).

the other hand, in *B.A.M. Development, L.L.C. v. Salt Lake County*,[108] the Supreme Court of Utah held that the *Nollan/Dolan* rule applied specifically pursuant to a state statute.[109]

Some courts share the puzzlement of Justice Thomas as to why the legislative character of the land development condition should affect whether it is an unconstitutional land development condition. Citing Justice Thomas's certiorari petition dissent in *Parking Ass'n of Georgia*, an Illinois appellate court disagreed that a municipality could "skirt its obligation to pay compensation . . . merely by having the Village Board of trustees pass an 'ordinance' rather than having a planning commission issue a permit."[110] Oregon appellate courts have consistently applied *Nollan/Dolan* to legislative and quasi-judicial exactions alike, whether required by a zoning ordinance or not. Similarly, the Texas Supreme Court stated in passing that,

> While we recognize that an ad hoc decision is more likely to constitute a taking than general legislation, we think it entirely possible that the government could "gang up" on particular groups to force extractions that a majority of constituents would not only tolerate but applaud, so long as burdens they would otherwise bear were shifted to others.[111]

5. Level of Detail Required for Showing Nexus and Proportionality

In *Home Builders Ass'n of Northern California v. City of Napa*, plaintiffs claimed that a generally applicable inclusionary housing ordinance, which offered developers a number of alternative modes of compliance and allowed a waiver under certain circumstances, effected a taking under *Nollan* and *Dolan*.[112] The court disagreed, holding that such a generally applicable ordinance did not warrant the heightened standard of review accorded to the type of individualized land use bargain that creates a "heightened risk of 'extortionate' use of the police power to exact unconstitutional" exactions.[113]

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108. 2006 UT 2, 128 P.3d 1161 (Utah 2006).

109. *Id.* at ¶¶ 39–44, 128 P.3d at 1170–71.

110. Amoco Oil Co. v. Vill. of Schaumburg, 661 N.E.2d 380, 389–90 (Ill. App. Ct. 1995); *cf.* Twin Lakes Dev. Corp. v Town of Monroe, 801 N.E.2d 821 (N.Y. 2003) (applying *Nollan* and *Dolan* to a fixed subdivision in lieu fee).

111. Town of Flower Mound v. Stafford Estates Ltd. P'ship, 135 S.W.3d 620, 641 (Tex. 2004).

112. 108 Cal. Rptr. 2d 60, 65 (Ct. App. 2001).

113. *Id.* at 65–66 (quoting Santa Monica Beach, Ltd. v. Superior Court, 968 P.2d 993 (Cal. 1999)).

6. When Must the Findings of Nexus and Proportionality be Made?

In both *Nollan* and *Dolan*, the administrative findings regarding the relationship between the public purpose served and the condition exacted were made long before either case went to court.[114] In *Hammer v. City of Eugene*, however, the city did not make findings when it conditionally approved applications to partition land.[115] Those approvals were subject to certain physical exactions.[116] The Court of Appeals of Oregon held that the city could make the required individualized showing of rough proportionality at trial.[117] The court reasoned that the administrative procedures in both *Nollan* and *Dolan* were merely incidental and that the Court in those cases thus did not intend to require prior findings. The court also explained that the issue of *when* findings are entered is not an issue properly brought under the Takings Clause.[118] Instead, the Court observed, that issue is more properly the subject of a due process inquiry.[119]

Likewise, in *B.A.M. Development, L.L.C. v. Salt Lake County,* the county sought to exercise its police power to require the developer to dedicate additional property for the purpose of widening a road adjacent to the developer's proposed subdivision.[120] The developer argued that the exaction was an unconstitutional taking and that the *Dolan* rough proportionality test should have been applied because the "dedication and improvement" was not "reasonably justified by the actual impact [of] the proposed development."[121] The county board and district court both rejected this argument and the developer appealed.[122] Before the Utah Supreme Court rendered its decision, the Utah state legislature codified the *Nollan/Dolan* test into its statute on county exactions.[123] The statute, however, did not retroactively apply to this case. In its opinion, the court noted that it had "yet to lend its voice to the unruly judicial chorus on this issue"[124] and would not "choose whether to adopt or apply the legislative/adjudicative model based solely on our judgment concerning which side of the debate has

114. Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 828 (1987); Dolan v. City of Tigard, 512 U.S. 374, 379–82 (1994).

115. 121 P.3d 693 (Or. Ct. App. 2005).

116. *Id.* at 698.

117. *Id.*

118. *Id.* at 697.

119. *Id.*

120. 2006 UT 2, ¶ 4, 128 P.3d 1164 (Utah 2006) ("Salt Lake County ordinance 15.28.010 requires developers of land to dedicate property . . . [for] streets.").

121. *Id.* at ¶ 7, 128 P.3d at 1164.

122. *Id.* at ¶ 7, 128 P.3d at 1164–65.

123. *Id.*

124. *Id.* at ¶ 45, 128 P.3d at 1171.

the more persuasive case. This is because our legislature has spoken directly to the question."[125] Stating that the court had taken "no position" on the question in the past and that "we are hard pressed to find a reason to assume that the legislative view of . . . [the] test would have been different before" and would not "upend any reasonable expectation on the part of a governmental entity," the Utah Supreme Court remanded the case and ordered the trial court to conduct a rough proportionality review of the exaction.[126]

7. Cost and Calculation of Fees

Impact fees are imposed by local governments for a variety of public facilities, including without limitation, roadway improvements, water and sewer facilities, solid waste disposal, parks, schools, libraries, and police and fire stations. These fees are typically imposed as part of the subdivision or development approval process and are common provisions in both development and annexation agreements. According to various studies, these fees can be extensive adding considerably to the cost of the development upon which they are levied.[127] For example, according to one California agency publication, in 1999, California home builders paid fees averaging $24,325 for each single family home constructed, with fees ranging from $11,176 to a high of $59,703.[128] When impact fees are added to other development costs such as building permit and zoning and planning application fees, the cost of development above and beyond acquisition and construction costs can be staggering, as shown in the following survey of residential development fees in selected suburban communities in California.[129]

Typically, local governments adopt ordinances to set the rate or schedule for these fees. Most ordinances adopt one of two methods in calculating impact fees. The first method is a fixed fee based on a unit of development. For example, Palm Beach, Florida's road impact fee ordinance has established a set fee of $300 per single family home,

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125. *Id.*

126. *Id.*

127. JAMES C. NICHOLAS & DAN DAVIDSON, IMPACT FEES IN HAWAII: IMPLEMENTING THE STATE LAW 9 (1992).

128. DIV. OF HOUS. POLICY DEV., CAL. DEP'T OF HOUS. AND CMTY. DEV., PAY TO PLAY: RESIDENTIAL DEVELOPMENT FEES IN CALIFORNIA CITIES AND COUNTIES, 1999 at 103 (2001), *available at* http://www.hcd.Ca.gov/hpd/pay2play/fee_rpt.pdf.

129. *Id.* at 61; *see also* Sandy Beach Def. Fund v. City Council of Honolulu, 773 P.2d 250 (Haw. 1989).

$200 per multiple family home, and $175 per mobile home.[130] The second adopts a variable formula based on the need for the facilities or improvements generated by the new development.[131] Although the fixed fee method is much simpler to adopt and apply, the formula method more accurately reflects the proportionate costs of public facilities attributable to specific types of new development.[132] This is particularly important in light of the *Dolan* decision. Some communities have adopted an alternative method of calculating the appropriate fee. Under this alternative method, the municipality in essence allows the developer to set its own fee by demonstrating that its share is less than the fee set by ordinance through the submission of independent studies and economic data.[133]

An impact fee ordinance should relate the impact fee that is charged to the developer to the needs generated by the new development. Calculation of the fees should be tied to a study, report, or plan based on an analysis of the new development's impact.[134] For example, most water and sewer impact fees are based on the amount of flowage required by a certain type of development, sometimes measured in P.E.'s or "Population Equivalents."

Courts have generally upheld fees based on average flow (for sewer) or usage (for water) or impact (for many other facilities or improvements). For example, the court in *Amherst Builders Ass'n v. City of Amherst*,[135] upheld the City's impact fee schedule that calculated sewage impact fees based on the average sewage flow for various types of structures, as estimated by the U.S. Environmental Protection Agency.[136] The City had responded to charges that the connection fee of $400 was invalid by introducing evidence that the "capital cost" of each connection averaged $1,186. The court found that the sewage impact fee was reasonable and proportionate to the sewage flow anticipated by the new development.[137]

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130. Home Builders & Contractors Ass'n of Palm Beach County, Inc. v. Bd. of County Comm'rs of Palm Beach County, 446 So. 2d 140, 142 (Fla. Dist. Ct. App. 1983).

131. NICHOLAS, NELSON & JUERGENSMEYER, *supra* note 13, at 37–38.

132. David L. Callies, *Exactions, Impact Fees and Other Land Use Development Conditions*, *in* ZONING AND LAND USE CONTROLS ch. 9 (E. Kelly ed., 1997).

133. *Home Builders & Contractors Ass'n of Palm Beach*, 446 So. 2d at 145.

134. *Id.*; *see also* F&W Assocs. v. County of Somerset, 648 A.2d 482 (N.J. Super. Ct. App. Div. 1994) (upholding traffic impact fee ordinance that was adopted only after a comprehensive study of existing road facilities, current zoning, projected population growth, and existing commercial uses).

135. 402 N.E.2d 1181 (Ohio 1980).

136. *Id.* at 1182.

137. *Id.* at 1184; *see also* Contractors & Builders Ass'n of Pinellas County v. City of Dunedin, 329 So. 2d 314, 318 (Fla. 1976) (upholding water and sewer connection fees that were less than the costs the city would incur in accommodating new uses of its water and sewer systems).

With respect to park and school impact fees, the calculation of the fees should insure that the fee is reasonably proportionate to the cost of providing the additional park or school facilities attributable to the new development.[138] Just what those fees may be used for depends upon the enabling statute or ordinance. Thus, for example, an Illinois court recently interpreted a school impact fee statute so that school impact fees may only be used to acquire land for school sites (and not to fund existing school expenses).[139] An Ohio court struck down park impact fees that were collected and used for the operation and maintenance of existing recreational facilities because the City failed to show the nexus between the proposed development and the use of fees for existing park facilities.[140] In some communities, the local governmental entity adopts an impact fee ordinance to impose park and school fees, then enters into an agreement with the impacted district (that is., the school or park district) to set out the procedures for collecting and remitting these fees.[141]

Impact fees should also be calculated to address the impact the new development is expected to have on nearby facilities. For example, the Illinois statute authorizing the imposition of road impact fees provides that the fee shall not "exceed the development's proportionate share of the cost of such road improvements" that are specifically and uniquely attributable to the new development.[142] In applying this standard, DuPage County Illinois' road impact fee ordinance established a "standard fee [table for residential, commercial, and other types of development based on] the cost of road construction and the number of motor vehicle trips generated by different types of land use[s]."[143] The county calculated the fees using formulas that traced cars as they left particular developments and entered the roads.[144] The court upheld the fee, finding that the county's fees were calculated in such a way to be specifically and uniquely attributable to the impact

138. *See, e.g.*, Wellington River Hollow, LLC v. King County, 54 P.3d 213, 219–20 (Wash. Ct. App. 2002).

139. Thompson v. Vill. of Newark, 768 N.E.2d 856 (Ill. App. Ct. 2002).

140. Bldg. Indus. Ass'n of Cleveland & Suburban Counties v. City of Westlake, 660 N.E.2d 501, 505 (Ohio Ct. App. 1995) (holding park impact fee unreasonable as it required only new construction developers to shoulder the burden of funding existing park facilities).

141. *See, e.g.*, VILLAGE OF NORTHBROOK, ILL., SUBDIVISION & DEV. CODE § 4-101G14.

142. 605 ILL. COMP. STAT. 5/5-605 (2006).

143. N. Ill. Home Builders Ass'n, Inc. v. County of Du Page, 621 N.E.2d 1012, 1017 (Ill. App. Ct. 1993).

144. *Id.* at 1020.

of the new development.[145] Further studies included the creation of a computer model to determine future travel patterns.

Similarly, a Florida court upheld a road impact fee ordinance intended to pay the cost of road construction necessitated by new development, finding that the formula for calculating the fee was reasonable.[146] Calculation of the applicable road impact fee was based on the "costs of road construction and the number of motor vehicle trips generated by [various] land uses."[147] "[The ordinance provides for a] fee of $300 per unit for single family homes, $200 per unit for multi[ple] family [developments], $175 per unit for mobile homes with other amounts for commercial [and] other [types of] development."[148] The court noted that the formula for calculating the fee was flexible and allowed the developer to furnish its own data to demonstrate that its share was less than the ordinance formula amount.[149]

8. Statutory Systems

Several states have attempted to bring order to the land development condition process by enacting comprehensive statutes to deal with many of the issues raised by the case law described in the preceding section. One of the most comprehensive comes from Hawaii, which authorizes its four counties to exact or levy impact fees,[150] provided they first engage in a needs assessment study.[151] A needs assessment study "determines the need for a public facility, the cost of development, and the level of service standards, and that projects future public facility capital improvement needs; provided that the study shall take into consideration and incorporate any relevant county general plan, development plan, or community plan."[152] "The study [must] be prepared by an engineer, architect, or other qualified professional and . . . identify service standard levels, project public facility capital improvement needs, and differentiate between existing and future needs."[153] The amount and type of impact fee to be charged

145. *Id.*

146. Home Builders & Contractors Ass'n of Palm Beach County, Inc. v. Board of County Commissioners of Palm Beach County, 446 So. 2d 140, 145 (Fla. Dist. Ct. App. 1983).

147. *Id.* at 142.

148. *Id.*

149. *Id.*

150. *See* HAW. REV. STAT. ANN. § 46-142 (LexisNexis 2003).

151. *Id.* § 46-141. "Assessment of impact fees shall be a condition precedent to the issuance of a grading or building permit and shall be collected in full before or upon issuance of the permit." *Id.* § 46-146. For comment on impact fee statute and its use and goals in Hawaii, see NICHOLAS & DAVIDSON, *supra* note 127.

152. HAW. REV. STAT. ANN. § 46-141.

153. *Id.* § 46-143(a).

to the developer is determined once the needs assessment study is complete.

The statute codifies the *Nollan/Dolan* test to establish how an impact fee is calculated. "An impact fee [must] be substantially related to the needs arising from the development and shall not exceed a proportionate share of the costs incurred or to be incurred in accommodating the development."[154]

> [S]even factors [that must] be considered in determining a proportionate share of public facility capital improvement costs:
>
> (1) The level of public facility capital improvements required to appropriately serve a development . . . ;
>
> . . . .
>
> (2) The availability of other funding for public facility capital improvements . . . ;
>
> (3) The cost of existing public facility capital improvements;
>
> (4) The methods by which existing public facility capital improvements were financed;
>
> (5) The extent . . . [the] developer . . . has contributed in the previous five years to the cost of existing public facility capital improvements and received no reasonable benefit . . . , and any credits that may be due to a development because of such contributions;
>
> (6) The extent to which a developer required to pay impact fees over the next twenty years may reasonably be anticipated to contribute to the cost of existing public facility capital improvements through user fees, debt service payments, or other payments, and any credits that may accrue to a development because of future payments; and
>
> (7) The extent to which a developer is required to pay impact fees as a condition precedent to the development of nonsite related public facility capital improvements, and any off-

154. *Id.* § 46-143(d).

sets payable to a developer because of this provision.[155]

Likewise, "[t]he pro rata amount of each impact fee [must] be based on the development and actual capital cost of public facility expansion, or a reasonable estimate thereof. . . ."[156]

"[I]mpact fees [can]not be collected from a developer until . . . [the] needs assessment study [is approved]."[157] Once approved, the fees that are collected must "be deposited in a special trust fund or interest-bearing account."[158] A county must spend the fees if it will provide a localized benefit to the development; for example, a county may establish a geographically limited benefit zone where the fees must be expended.[159] Moreover, "[i]mpact fees [can only] be expended for public facilities of the type for which they are collected and of reasonable benefit to the development."[160] If none of this is done "[w]ithin six years of the date of collection,"[161] the county must "refund to the developer or the developer's successor in title the amount of fees paid and any accrued interest."[162]

Florida also has a statutory system for providing adequate public facilities for new developments. Their system is known as "concurrency." Florida's concurrency requirement for developments applies to the following public facilities that are affected by development: "[s]anitary sewer, solid waste, drainage, potable water, parks and recreation, schools, and transportation facilities, including mass transit."[163] The concurrency requirement requires the following from new developments:

Water.

[S]anitary sewer, solid waste, drainage, adequate water sup-

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155. *Id.* § 46-143(d).

> 'Public facility capital improvement costs' means costs of land acquisition, construction, planning and engineering, administration, and legal and financial consulting fees associated with construction, expansion, or improvement of a public facility. Public facility capital improvement costs do not include expenditures for required affordable housing, routine and periodic maintenance, personnel, training, or other operating costs.

Id. § 46-141.

156. *Id.* § 46-143(c).

157. *Id.* § 46-144(3).

158. *Id.* § 46-144(1).

159. *Id.* § 46-144(2). "A county or board shall explain in writing and disclose at a public hearing reasons for establishing or not establishing benefit zones." *Id.*

160. *Id.* § 46-144(4).

161. *Id.* § 46-144(5).

162. *Id.* § 46-145(a).

163. FLA. STAT. ANN. § 163.3180(1)(a) (West 2006).

> plies and potable water facilities [must] be in place and available to serve [the] new development no later than the issuance by the local government of [the] certificate of occupancy . . . . [In addition, before a building permit is issued,] the local government [must] consult with the applicable water supplier to determine whether adequate water supplies to serve the new development will be available no later than the anticipated date of issuance . . . of the certificate of occupancy . . . . A local government may meet the concurrency requirement for sanitary sewer through the use of onsite sewage treatment and disposal systems approved by the [State] Department of Health to serve the new development.[164]

Parks and Recreation.

> [Facilities for parks and recreation intended] to serve new development [must] be in place or under actual construction no later than [one] year after [the local government has issued] a certificate of occupancy . . . . However, the acreage of such facilities [must] be dedicated or be acquired by the local government *prior* to issuance . . . of [the] certificate of occupancy . . . or funds in the amount of the developer's fair share shall be committed no later than the local government's approval to commence construction.[165]

Transportation facilities.

"[T]ransportation facilities needed to serve new development [must] be in place or under actual construction [no later than three] years after the local government approve[d] a building permit . . . that results in traffic generation."[166] According to the statute, "[t]he concurrency requirement as implemented in local comprehensive plans does not apply to public transit facilities."[167]

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164. *Id.* § 163.3180(2)(a).

165. *Id.* § 163.3180(2)(b).

166. *Id.* § 163.3180(2)(c).

167. *Id.* § 163.3180(4)(b).

> [This] include[s] transit stations and terminals, transit station parking, park-and-ride lots, intermodal public transit connection or transfer facilities, and fixed bus, guideway, and rail stations. [However] . . . the terms "terminals" and "transit facilities" do not include airports or seaports or commercial or residential development constructed in conjunction with a public transit facility.

Id.

Schools.

"School concurrency [must] be established on a districtwide basis and [must] include all public schools in the district . . . . [While t]he application of school concurrency to development [is] based on the [local government's] adopted comprehensive plan,"[168] the statute provides for minimum requirements. These requirements include: a public school facilities element,[169] level-of-service standards,[170] designation of a service area,[171] the financial feasibility of the public school facilities,[172] and the owner and "the developer executes a legally binding commitment to provide mitigation proportionate to the demand for public school facilities to be created by actual development of the property . . . ."[173]

Any other "public facility or service cannot be made subject to concurrency on a statewide basis without appropriate study and approval by the Florida State Legislature. [Despite this limitation for the State], a 'local government may extend' the concurrency requirement so that it applies to additional public facilities within its jurisdiction."[174]

The statute does provide for some flexibility in applying concurrency to new development. "The concurrency requirement, except as it relates to transportation facilities[175] and public schools, . . . may be waived by a local government for urban infill and redevelopment areas . . . if [the] waiver does not endanger public health or safety as defined by the local government in its local government comprehensive plan."[176] An urban infill and redevelopment area is

> an area or areas designated by a local government where:
>
> a) Public services such as water and wastewater, transportation, schools, and recreation are already available or are scheduled to be provided in an adopted [five]-year schedule of capital improvements;

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168. *See id.* § 163.3180(13).

169. *See id.* § 163.3180(13)(a).

170. *See id.* § 163.3180(13)(b).

171. *See id.* § 163.3180(13)(c).

172. *See id.* § 163.3180(13)(d).

173. *Id.* § 163.3180(13)(e)(1). "Appropriate mitigation options include the contribution of land; the construction, expansion, or payment for land acquisition or construction of a public school facility; or the creation of mitigation banking based on the construction of a public school facility in exchange for the right to sell capacity credits." *Id.*

174. *Id.* § 163.3180(1)(a).

175. The statute provides for an entire section on transportation facility exceptions from the concurrency requirement. *See id.* § 163.3180(5).

176. *Id.* § 163.3180(4)(c).

> b) The area, or one or more neighborhoods within the area, suffers from pervasive poverty, unemployment, and general distress . . . ;
>
> c) The area exhibits a proportion of properties that are substandard, overcrowded, dilapidated, vacant or abandoned, or functionally obsolete which is higher than the average for the local government;
>
> d) More than [fifty] percent of the area is within 1/4 mile of a transit stop, or a sufficient number of such transit stops will be made available concurrent with the designation; and
>
> e) The area includes or is adjacent to community redevelopment areas, brownfields, enterprise zones, or Main Street programs, or has been designated by the state or Federal Government as an urban redevelopment, revitalization, or infill area under empowerment zone, enterprise community, or brownfield showcase community programs or similar programs.[177]

The same standard for urban infill and redevelopment areas is used when a local government grants an exception for transportation facilities to a new development:

> A local government may grant an exception from the concurrency requirement for transportation facilities if the proposed development is otherwise consistent with the adopted local government comprehensive plan and is a project that promotes public transportation or is located within an area designated in the comprehensive plan for: (1) Urban infill development; (2) Urban redevelopment; (3) Downtown revitalization; or (4) Urban infill and redevelopment . . . .[178]

Even with the exception, "a local government [must] adopt into the plan and implement strategies to support and fund mobility within the designated exception area, including alternative modes of transportation."[179] The local government must consult with the Department of Transportation to assess the impact that the proposed

177. *Id.* § 163.2514(2)(a)–(e).
178. *Id.* § 163.3180(5)(b).
179. *Id.* § 163.3180(5)(e).

area is expected to have on state highways and roadways and develop a plan to mitigate any such impacts.[180]

Of course, the legal and constitutional issues surrounding the providing of infrastructure through land development conditions are largely obviated should local government and landowner execute a valid land development agreement.

III. DEVELOPMENT AGREEMENTS

A. Why Development Agreements?

Both developers and local governments face difficult problems in the land development approval process. Local governments are unable to exact dedications of land or fees of the "impact" or "in-lieu" variety without establishing a clear connection or nexus between the proposed development and the dedication or fee.[181] The developer is unable to "vest" or guarantee a right to proceed with a project until that project is commenced.[182] The development agreement offers a solution to both landowner/developer and local government. Often authorized by statute to help avoid reserved power and Contract Clause problems, discussed below, a well-structured agreement can be drafted to

180. *Id.* § 163.3180(5)(f).

181. For more detailed treatment of this subject, see DAVID L. CALLIES ET AL., BARGAINING FOR DEVELOPMENT: A HANDBOOK ON DEVELOPMENT AGREEMENTS, ANNEXATION AGREEMENTS, LAND DEVELOPMENT CONDITIONS, VESTED RIGHTS, AND THE PROVISION OF PUBLIC RIGHTS at art. III, *Development Agreements* (2003) [hereinafter, CALLIES ET AL., BARGAINING FOR DEVELOPMENT]; D. Callies & J. Tappendorf, *Unconstitutional Land Development Conditions and the Development Agreement Solution: Bargaining for Public Facilities After* Nollan *and* Dolan, 51 CASE W. RES. L. REV. 663 (2001); Judith Welch Wegner, *Moving Toward the Bargaining Table: Contract Zoning, Development Agreements, and the Theoretical Foundations of Government Land Use Deals*, 65 N.C. L. REV. 957, 1017–20 (1987) (describing the "rational nexus" test adopted by a majority of jurisdictions to assess the reasonableness of provisions requiring exactions of property in development agreements and the expansion of the doctrine governing exactions to address the use of "impact fees"); Lyle S. Hosoda, *Development Agreement Legislation in Hawaii: An Answer to the Vested Rights Uncertainty*, 7 U. HAW. L. REV. 173 (1985); TAKINGS: LAND-DEVELOPMENT CONDITIONS AND REGULATORY TAKINGS AFTER *DOLAN* AND *LUCAS* chs. 4, 9, 10, 11 (David L. Callies ed., 1996).

182. *See* John J. Delaney, *Vesting Verities and the Development Chronology: A Gaping Disconnect?*, 3 WASH. U. J.L. & POL'Y 603, 607–08 (2000) (noting that many states require action such as construction or expenditure of funds in reliance on a development permit for the permit to be valid).

deal with a variety of common issues which arise in the land development process between landowner and local government.[183]

B. The Basic Problem: Bargaining Away the Police Power and Reserved Power

The first issue arising in this type of land development process is whether the local government has bargained away its police power by entering into an agreement under which it promises not to change its land use regulations during the life of the agreement. Specific statutory authorization is helpful to make clear that these agreements effectuate a public purpose recognized by the state. To date, thirteen states have adopted legislation enabling local governments to enter into development agreements with landowner/developers.[184]

1. "Freezing" and the "Contracting Away" Issue

It is black letter law that a local government may not contract away its police power,[185] particularly in the context of zoning deci-

183. *See generally* DEVELOPMENT AGREEMENTS: ANALYSES, COLORADO CASE STUDIES COMMENTARY (Erin J. Johnson & Edward H. Ziegler eds., 1993); DEVELOPMENT AGREEMENTS: PRACTICE, POLICY, AND PROSPECTS (Douglas R. Porter & Lindell L. Marsh eds., 1989); DAVID J. LARSEN, DEVELOPMENT AGREEMENT MANUAL: COLLABORATION IN PURSUIT OF COMMUNITY INTERESTS (2002), *available at* http://www.cacities.org/resource_files/20590 (select "FinalDevAgreement 4-5-02.pdf"). For commentary on the British experience with development agreements, see Callies & Grant, *supra* note 7. See CALLIES ET AL., BARGAINING FOR DEVELOPMENT, *supra* note 181, for a checklist on drafting agreements in Appendix XVI, and Appendices XI, XIV and XV for sample development and annexation agreements.

184. *See* ARIZ. REV. STAT. ANN § 9-500.05 (West Supp. 2006); CAL. GOV'T CODE § 65864 (West 1997); COLO. REV. STAT. § 278.0201-106 (West 2001); FLA. STAT. ANN. § 163.3220 (West 2006); LA. REV. STAT. ANN. § 33:4780.22 (West 2002); NEV. REV. STAT. Ann. § 278.0201 (LexisNexis 2002); N.J. STAT. ANN. § 40:55D-45.2 (West 1991); OR. REV. STAT. § 94.504 (2001); VA. CODE ANN. § 15.2-2303.1 (2003 & Supp. 2006) (applies only to counties with a population between 10,300 and 11,000 and developments consisting of more than 1000 acres); WASH. REV. CODE § 36.70B.170 (2004).

185. *See* Carlino v. Whitpain Investors, 453 A.2d 1385, 1388 (Pa. 1982) ("[I]ndividuals cannot, by contract, abridge police powers which protect the general welfare and public interest").

sions.[186] Stated another way, it is impermissible for the government to bind itself from exercising its police powers. It is thus considered to be against public policy to permit the bargaining of zoning and subdivision regulations for agreements and stipulations on the part of developers to do or refrain from doing certain things. Because land use and development regulations represent exercises of police power, a development or annexation agreement binding a local government not to exercise these regulatory powers arguably violates the reserved powers doctrine,[187] and is, therefore, ultra vires.

Under this doctrine, bargaining away the police power is the equivalent of a current legislature attempting to exercise legislative power reserved to later legislatures.[188] However, an analysis of the relevant cases indicates that such agreements with long or permanent terms, are what the courts generally inveigh against. The source of the reserved powers doctrine, *Corp. of the Brick Presbyterian Church v. Mayor of New York*, involved the municipal abrogation of a lease executed over fifty years before.[189] While a few later cases do involve invalidation of municipal actions of more recent vintages,[190] the majority of cases on this issue deal with local government agreements dec-

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186. *See* Cederberg v. City of Rockford, 291 N.E.2d 249, 251 (Ill. App. Ct. 1972) (voiding a restrictive covenant and a rezoning ordinance because the law "condemns the practice of regulating zoning through agreements or contracts between the zoning authorities and property owners"); Houston Petroleum Co. v. Auto. Prods. Credit Ass'n, 87 A.2d 319, 322 (N.J. 1952) ("Contracts thus have no place in a zoning plan and a contract between a municipality and a property owner should not enter into the enactment or enforcement of zoning regulations."); V. F. Zahodiakin Eng'g Corp. v. Zoning Bd. of Adjustment, 86 A.2d 127, 131 (N.J. 1952) ("Zoning is an exercise of the police power to serve the common good and general welfare. It is elementary that the legislative function may not be surrendered or curtailed by bargain or its exercise controlled by the considerations which enter into the law of contracts.").

187. *See, e.g.*, Robert M. Kessler, *The Development Agreement and Its Use in Resolving Large Scale, Multi-Party Development Problems: A Look at the Tool and Suggestions for Its Application*, 1 J. LAND USE & ENVTL. L. 451, 464–69 (1985) (discussing the reserved powers doctrine and the inability of local governments to contract away police powers); Bruce M. Kramer, *Development Agreements: To What Extent Are They Enforceable?*, 10 REAL EST. L.J. 29, 37–45 (1981) (discussing the history and current viability of the reserved powers doctrine in the context of development agreements).

188. *See* Stone v. Mississippi, 101 U.S. 814, 817–18 (1879) ("[N]o legislature can curtail the power of its successors to make such laws as the may deem proper in matters of police"); Corp. of the Brick Presbyterian Church v. Mayor of New York, 5 Cow. 538, 542 (N.Y. Sup. Ct. 1826) (noting that local governments have "no power to limit their legislative discretion by covenant"); Kramer, *supra* note 187, at 37–39 (discussing the doctrine of reserved powers).

189. 5 Cow. 538.

190. *See, e.g.*, Hartnett v. Austin, 93 So. 2d 86, 89–90 (Fla. 1956) (affirming the lower court's permanent injunction of a proposed revision of a zoning ordinance that had not yet taken effect); *V. F. Zahodiakin*, 86 A.2d at 131–32 (affirming the lower court's invalidation of a decision made earlier by the local board of adjustment that purported to grant a "variance" from zoning requirements).

ades old. The dominant view is that development agreements, drafted to reserve some governmental control over the agreement, do not contract away the police power, but rather constitute a valid present exercise of that power. Good analogous authority exists for this premise.[191]

A subsidiary question under the reserved powers doctrine is whether a city council, in exercising its power to contract, can make a contract that binds its successors. In *Carruth v. City of Madera*,[192] the City contended that obligations under an annexation agreement executed by a predecessor council were invalid because they deprived the successor city council of the power to "determine city policy" and act in the public interest.[193] The court, however, held that the council of the municipality executed a contract sufficient to bind the city, and that the contract was fair, just, and reasonable at the time of its execution.[194] The court concluded that the contract was neither void nor voidable merely because some of its executory features may operate to bind a successor council.[195]

One of the clearest rejections of the application of the reserved power doctrine comes from the broad Nebraska Supreme Court opinion upholding development agreements in *Giger v. City of Omaha*.[196] Those challenging the agreement claimed that development agreements were a form of contract zoning.[197] However, the Nebraska Supreme Court preferred to characterize such agreements as a form of conditional zoning that actually increased the city's police power, rather than lessened it.[198] The agreements permitted more restrictive zoning (attaching conditions through agreement) than a simple

191. *See, e.g.*, Morrison Homes Corp. v. City of Pleasanton, 130 Cal. Rptr. 196, 202 (Ct. App. 1976) (holding that the effect of the general rule is "to void only a contract which amounts to a city's 'surrender,' or 'abnegation' of its [c]ontrol of a properly municipal function," and that the city's reservations of control over the land subject to an annexation agreement, as well as the "just, reasonable, fair and equitable" nature of the agreement, rendered the agreement valid and enforceable against the city).

192. 43 Cal. Rptr. 855 (Dist. Ct. App. 1965).

193. *Id.* at 860.

194. *Id.* at 860 n.190.

195. *Id.* at 860–61; *see also* Denio v. City of Huntington Beach, 140 P.2d 392, 397 (Cal. 1943) (holding that a "fair, just, and reasonable" contract entered into by a governing body of a municipality "is neither void nor voidable merely because some of its executory features may extend beyond the terms of office of the members of [the governing] body"), *overruled on other grounds by* Fracasse v. Brent, 494 P.2d 9 (Cal. 1972).

196. 442 N.W.2d 182 (Neb. 1989).

197. *Id.* at 189.

198. *Id.* at 190.

Euclidean rezoning to a district in which a variety of uses would be permitted of right.[199]

Similarly, a recent California appeals court squarely upheld a development agreement that was challenged directly on "surrender of police power" grounds, holding that a "zoning freeze in the Agreement is not . . . a surrender or abnegation [of the police power]."[200] In *Santa Margarita Area Residents Together v. San Luis Obispo County* ("SMART"),[201] an area residents' association contended that because San Luis Obispo County had entered into a development agreement for a project before the project was ready for construction, thereby freezing zoning for a five-year period, the county improperly contracted away its zoning authority. In holding for the county, the court noted that "[l]and use regulation is an established function of local government," providing the authority for a local government "to enter into contracts to carry out the function."[202] The county's development agreement: (1) required that the project be developed in accordance with the county's general plan; (2) did not permit construction until the county had approved detailed building plans; (3) retained the county's discretionary authority in the future; and (4) allowed a zoning freeze of limited duration only.[203] The court found that the zoning freeze in the county's development agreement was not a surrender of the police power but instead "advance[d] the public interest by preserving future options."[204]

In *Stephens v. City of Vista*, the Stephenses purchased property in 1973 to develop an apartment complex of approximately 140 to 150 units.[205] Subsequently, the City of Vista lowered the access street to the property, frustrating the Stephenses' contemplated use, and downzoned the property.[206] The Stephenses sued. The city and the

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199. *Id.* at 192. The court reasoned as follows:

> In sum, we find that there is not clear and satisfactory evidence to support the appellants' contention that the city has bargained away its police power. The evidence clearly shows that the city's police powers are not abridged in any manner and that the agreement is expressly subject to the remedies available to the city under the Omaha Municipal Code. Further, we find that the agreement actually enhances the city's regulatory control over the development rather than limiting it.

Id.

200. Santa Margarita Area Residents Together v. San Luis Obispo County, 100 Cal. Rptr. 2d 740, 748 (Ct. App. 2000).

201. *Id.*

202. *Id.* at 748.

203. *Id.* at 744.

204. *Id.* at 748.

205. 994 F.2d 650 (9th Cir. 1993)

206. *Id.* at 654.

Stephenses eventually entered into a settlement agreement providing for a specific plan and zoning that permitted construction of a maximum of 140 units.[207] After rezoning the property, the city denied a site development plan, in part because it wanted the Stephenses to reduce the density. The Stephenses then renewed their lawsuit against the city.[208]

The city argued that the settlement agreement unlawfully contracted away its police power. The court disagreed. First, the court noted that when the city entered into the settlement agreement, it understood it was obligated to approve 140 units.[209] Further, relying on *Morrison Homes Corp. v. City of Pleasanton*,[210] which upheld the validity of an annexation agreement, the court held that while generally a local government cannot contract away its legislative and governmental functions, this "rule applies to void only a contract which amounts to a 'surrender' . . . of [the local government's] *control* of a municipal function."[211] Therefore, the city could contract for a guaranteed density and exercise its discretion in the site development process without surrendering control of all of its land use authority. "The court awarded $727,500 in damages [for breaching the agreement] based on the difference between the value of the property with an entitlement of 140 units and the value of the property with a developable density of 55 units" (the current zoning), which the appellate court affirmed.[212] Similarly, a development agreement that obligates a local government to permit a certain density and type of development should be enforceable by the developer.

In sum, the current application of the reserved powers clause to abrogate government/private contracts has been rare and courts have attempted to find other grounds to uphold those contracts which are fair, just, reasonable, and advantageous to the local government.[213] It is unlikely that courts will fall back on the reserved powers clause to invalidate development agreements passed pursuant to state statute,

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207. *Id.* at 652.
208. *Id.* at 653.
209. *Id.* at 657.
210. 130 Cal. Rptr. 196 (Ct. App. 1976).
211. *Stephens*, 994 F.2d at 655 (emphasis in original).
212. *Id.* at 657.
213. *See, e.g.*, Carruth v. City of Madera, 43 Cal. Rptr. 855, 860–61 (Ct. App. 1965) (holding contract entered into by the city can be enforced, even if it extends beyond the legislative term, if the contract is fair, just, reasonable, and advantageous to the city); *see also* Kramer, *supra* note 187, at 41 (discussing *Carruth*).

especially if the agreements have a fixed termination date that is not decades away.[214]

2. The Contracts Clause and Reserved Powers

It is also arguable that the United States Constitution provides protection for development and annexation agreements in the face of a reserved power challenge. The Contracts Clause states, "No State shall . . . pass any . . . Law impairing the Obligation of Contracts."[215] Although statutorily defined as either a legislative or administrative act, a development agreement will be treated as a contract "when the language and circumstances evince a legislative intent to create private rights of a contractual nature enforceable against the State."[216]

Once the parties enter into a development agreement, strict application of the Contracts Clause would prohibit the government from passing any law or regulation that would subsequently impair the resulting contractual obligations. Further, any such act would be unconstitutional, notwithstanding the fact that the new regulation may be required by a genuine health, safety, or welfare concern. Certainly this result would not be tolerated, and therefore one must conclude that if a development agreement, subject to the Contract Clause, irrevocably binds government to not exercise its police power in promotion of the public interest, then the agreement violates the reserved powers doctrine and is ultra vires.

The limitation of the Contract Clause is, however, neither literal nor absolute.[217] The Supreme Court has held that the Contracts Clause limitation cannot operate to eclipse or eliminate "'essential attributes of sovereign power' necessarily reserved by the States to safeguard the welfare of their citizens."[218] The test in *United States Trust Co. of New York v. New Jersey*, as refined in *Allied Structural*

214. *See, e.g.*, 65 ILL. COMP. STAT. ANN. 5/11-15.1-1 (West 1993) (restricting the term of any annexation agreement to twenty years).

215. U.S. CONST. art. I, § 10, cl. 1.

216. U.S. Trust Co. of New York v. New Jersey, 431 U.S. 1, 18 n.14 (1977). For a full discussion, see Wegner, *supra* note 181, at 995–1003 (making the case that, although writers have simply assumed that development agreements are contractual in nature, it would be more correct to characterize development agreements as possessing a hybrid contractual-regulatory nature).

217. *See* Eric Sigg, *California's Development Agreement Statute*, 15 SW. U. L. REV. 695, 720–22 (1985) (discussing tension between the Contracts Clause and the "reserved powers" doctrine, and describing various tests to determine whether a particular contract "surrenders an essential attribute of [the state's] sovereignty"). *Id.* at 722 (quoting *U.S. Trust Co. of New York*, 431 U.S. at 23).

218. *U.S. Trust Co. of New York*, 431 U.S. at 21 (quoting Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 435 (1934)).

Steel Co. v. Spannaus,[219] ultimately requires a balancing of the exercise of the police power against the impairment resulting from the exercise of such police power. The decisions suggest that any exercise of the police power that impairs any obligations under a development agreement would be subject to strict scrutiny, and, therefore, must be justifiable as an act "reasonable and necessary to serve an important public purpose."[220] Just what constitutes an "important public purpose" sufficient to justify the impairment of contract obligations is a factual determination. In *United States Trust Co. of New York*, the court held that the bondholders' security interests outweighed the state's interest in pollution control, rapid transit, and resource conservation.[221] Similarly, in *Allied Structural Steel*, the state's interest in protecting its citizens' pensions failed to prevail over a private company's rights in its own pension plan.[222]

C. Statutory Authority: Critical for Development Agreements

Courts that condemn zoning by agreement inveigh against the abridgment of powers protecting the general welfare and the "bartering . . . [of] legislative discretion for emoluments that had no bearing on the merits of the requested amendment."[223] This makes statutory authority important, if not critical. Indeed, an Iowa court held that a

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219. 438 U.S. 234 (1978).

220. *U.S. Trust Co. of New York*, 431 U.S. at 25.

221. *Id.* at 28–31.

222. For a thorough discussion of the *United States Trust Co. of New York-Allied Structural Steel Co.* test, see Anthony v. Kualoa Ranch, Inc., 736 P.2d 55 (Haw. 1987), in which the Hawaii Supreme Court applied the Contracts Clause doctrine to strike down a state statute requiring landlords to pay for leasehold improvements, at the tenant's option, as an unconstitutional impairment of contractual rights. *See also* Quality Refrigerated Servs., Inc. v. City of Spencer, 908 F. Supp. 1471 (N.D. Iowa 1995) (granting the city's motion to dismiss, in part because plaintiff failed to state a cause of action under the Contract Clause of the U.S. Constitution and because it failed to show that city zoning ordinance substantially impaired a contractual relationship, or that legitimate government interests would not justify such an impairment if it existed); Kramer, *supra* note 187, at 35 (concluding that "[s]ubsequent legislative action seeking to amend, modify, or repeal [a] development agreement would undoubtedly impair the obligation of the contract and if less onerous alternatives were available to the legislature to achieve the same policy goals they would have to be taken"); Sigg, *supra* note 217, at 722 ("[I]t would appear that impairment by a city or county of its own development agreement would have to survive the heightened scrutiny of a 'reasonable and necessary to serve important state purposes' test"). For an exhaustive discussion of the reserved powers doctrine and its applicability to local government contracts (and its Contract Clause limitations), see Janice C. Griffith, *Local Government Contracts: Escaping from the Governmental/Proprietary Maze*, 75 IOWA L. REV. 277 (1990).

223. Hedrich v. Village of Niles, 250 N.E.2d 791, 796 (Ill. App. Ct. 1969).

city's promise to later widen a street and construct a sidewalk amounted to an illegal contract to perform a governmental function in the future.[224] This it could not do without statutory authority. The court opined that the same reasoning would also apply to the city's exercise of its police power.

1. Protection of General Welfare

The first issue—protection of general welfare—is probably disposed of by strong public purpose-serving language. California,[225] Florida,[226] and Hawaii[227] all have such language in their development agreement statutes.

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224. *See* Marco Dev. Corp. v. City of Cedar Falls, 473 N.W.2d 41, 44 (Iowa 1991) (holding that the same limitation that prohibits a legislature from binding successive legislative bodies applies to a legislature's grant to a city, through a home-rule amendment to the state constitution, of "the power to contract for a the exercise of its governmental or legislative authority").

225. The California Code provides:

> The Legislature finds and declares that:
>
> (a) The lack of certainty in the approval of development projects can result in a waste of resources, escalate the cost of housing and other development to the consumer, and discourage investment in and commitment to comprehensive planning which would make maximum efficient utilization of resources at the least economic cost to the public.
>
> (b) Assurance to the applicant for a development project that upon approval of the project, the applicant may proceed with the project in accordance with existing policies, rules and regulations, and subject to conditions of approval, will strengthen the public planning process, encourage private participation in comprehensive planning, and reduce the economic costs of development.
>
> (c) The lack of public facilities, including, but not limited to, streets, sewerage, transportation, drinking water, school, and utility facilities, is a serious impediment to the development of new housing. Whenever possible, applicants and local governments may include provisions in agreements whereby applicants are reimbursed over time for financing public facilities.

CAL. GOV'T CODE § 65864 (West 1997).

226. The Florida code provides the following:

> (2) The Legislature finds and declares that:
>
> (a) The lack of certainty in the approval of development can result in a waste of economic and land resources, discourage sound capital improvement planning and financing, escalate the cost of housing and development, and discourage commitment to comprehensive planning.

(b) Assurance to a developer that upon receipt of his or her development permit or brownfield designation he or she may proceed in accordance with existing laws and policies, subject to the conditions of a development agreement, strengthens the public planning process, encourages sound capital improvement planning and financing, assists in assuring there are adequate capital facilities for the development, encourages private participation in comprehensive planning, and reduces the economic costs of development.

(3) In conformity with, in furtherance of, and to implement the Local Government Comprehensive Planning and Land Development Regulation Act and the Florida State Comprehensive Planning Act of 1972, it is the intent of the Legislature to encourage a stronger commitment to comprehensive and capital facilities planning, ensure the provision of adequate public facilities for development, encourage the efficient use of resources, and reduce the economic cost of development.

(4) This intent is effected by authorizing local governments to enter into development agreements with developers, subject to the procedures and requirements of ss. 163.3220–163.3243.

FLA. STAT. ANN. § 163.3220 (West 2006).

227. The Hawaii code provides the following in the Findings and Purposes:

The legislature finds that with land use laws taking on refinements that make the development of land complex, time consuming, and requiring advance financial commitments, the development approval process involves the expenditure of considerable sums of money. Generally speaking, the larger the project contemplated, the greater the expenses and the more time involved in complying with the conditions precedent to filing for a building permit.

The lack of certainty in the development approval process can result in a waste of resources, escalate the cost of housing and other development to the consumer, and discourage investment in and commitment to comprehensive planning. Predictability would encourage maximum efficient utilization of resources at the least economic cost to the public.

Public benefits derived from development agreements may include, but are not limited to, affordable housing, design standards, and on- and off-site infrastructure and other improvements. Such benefits may be negotiated for in return for the vesting of development rights for a specific period.

Under appropriate circumstances, development agreements could strengthen the public planning process, encourage private and public participation in the comprehensive planning process, reduce the economic cost of development, allow for the orderly planning of public facilities and services and the allocation of cost. As an administrative act, development agreements will provide assurances to the applicant for a particular development project, that upon approval of the project, the applicant may proceed with the project in accordance with all applicable statutes, ordinances, resolutions, rules, and policies in existence at the time the development agreement is executed and that the project will not be restricted or prohibited by the county's subsequent enactment or adoption of laws, ordinances, resolutions, rules, or policies.

2. Requirements

As to the bartering away of unrelated (to land use) emoluments, a well-drafted statute generally limits such agreements to specific land use matters, with a catch-all for related matters. Florida's development agreement statute contains such language.[228] What the stat-

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Development agreements will encourage the vesting of property rights by protecting such rights from the effect of subsequently enacted county legislation which may conflict with any term or provision of the development agreement or in any way hinder, restrict, or prevent the development of the project. Development agreements are intended to provide a reasonable certainty as to the lawful requirements that must be met in protecting vested property rights, while maintaining the authority and duty of government to enact and enforce laws which promote the public safety, health, and general welfare of the citizens of our State. The purpose of this part is to provide a means by which an individual may be assured at a specific point in time that having met or having agreed to meet all of the terms and conditions of the development agreement, the individual's rights to develop a property in a certain manner shall be vested.

HAW. REV. STAT. Ann. § 46-121 (LexisNexis 2003).

228. The Florida code provides the following:

(1) A development agreement shall include the following:

(a) A legal description of the land subject to the agreement, and the names of its legal and equitable owners;

(b) The duration of the agreement;

(c) The development uses permitted on the land, including population densities, and building intensities and height;

(d) A description of public facilities that will service the development, including who shall provide such facilities; the date any new facilities, if needed, will be constructed; and a schedule to assure public facilities are available concurrent with the impacts of the development;

(e) A description of any reservation or dedication of land for public purposes;

(f) A description of all local development permits approved or needed to be approved for the development of the land;

(g) A finding that the development permitted or proposed is consistent with the local government's comprehensive plan and land development regulations;

(h) A description of any conditions, terms, restrictions, or other requirements determined to be necessary by the local government for the public health, safety, or welfare of its citizens; and

utes contemplate is the tradeoff of zoning for development-generated public-infrastructure needs (whether or not, it should be added, such public-infrastructure needs are generated by the instant development). This is confirmed by cases upholding cooperative and annexation agreements;[229] low-rent housing for zoning;[230] annexation, zoning, and sewer connections for annexation and annexation fees;[231] and redevelopment agreements.[232]

The Hawaii, Florida, Nevada, and California statutes contain minimum standards for describing the basic character of a proposed development subject to a development agreement.[233] These include the size and shape of buildings. In a decision that clearly signals the extent of flexibility possible in California, a California court of appeals recently upheld a development agreement containing no such precise

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(i) A statement indicating that the failure of the agreement to address a particular permit, condition, term, or restriction shall not relieve the developer of the necessity of complying with the law governing said permitting requirements, conditions, term, or restriction.

(2) A development agreement may provide that the entire development or any phase thereof be commenced or completed within a specific period of time.

FLA. STAT. ANN. § 163.3227.

229. *See* Hous. & Redev. Auth. for Lincoln County v. Jorgensen, 328 N.W.2d 740, 742–43 (Minn. 1983) (holding that the agreement between the city and the Housing and Redevelopment Authority "required the city to issue the conditional use permits" for the development of the "low-income public housing units").

230. *See* Hous. Auth. of L.A. v. City of Los Angeles, 243 P.2d 515, 524 (Cal. 1952) (holding that the city was bound by the cooperative agreement with the housing authority that approved development and construction of low-rent housing project).

231. *See* Morrison Homes Corp. v. City of Pleasanton, 130 Cal. Rptr. 196, 201–03 (Ct. App. 1976) (holding that annexation agreements entered into between city and developer that required the city to provide sewage service to planned development were binding and enforceable against the city); Meegan v. Vill. of Tinley Park, 288 N.E.2d 423, 426 (Ill. 1972) (dismissing developer's mandamus action for issuance of a building permit to build a gasoline station pursuant to annexation agreement within a reasonable time after expiration of annexation agreement's statutory five-year period of validity).

232. *See* Mayor & City Council of Balt. v. Crane, 352 A.2d 786, 791–92 (Md. 1976) (holding that where a developer conveyed a strip of property to the city for highway purposes under a zoning ordinance that allowed the developer's proposed development to contain the same density of dwelling units as if the land had not been conveyed, the developer acquired vested contractual rights that were enforceable against the city).

233. *See* HAW. REV. STAT. ANN. § 46-126 (LexisNexis 2003); FLA. STAT. ANN. § 163.3227; NEV. REV. STAT. ANN. § 278.0201 (LexisNexis 2005); CAL. GOV'T CODE § 65865.2 (West 1997).

standards.[234] According to the court, it was sufficient that the zoning ordinance governing the agreement contained height and size limitations in the zone where the proposed project was to be constructed.[235]

This clearly indicates the importance of a well-drafted statute in advancing the legality of the development agreement, particularly in the face of a challenge on bargaining-away-of-police grounds power. Indeed, there is only one significant case upholding a development agreement against this and other challenges without the benefit of such a statute.[236] It is therefore worth examining what other basic provisions a typical development-agreement statute contains. Thirteen states presently have such statutes.[237] The most detailed statute comes from Hawaii, and so the citations that follow are primarily to that statute. However, California remains the state in which the vast majority of development agreements appear to be negotiated and are in effect.[238]

D. A Statutory Checklist

1. Enabling Ordinance

A preliminary issue is whether an enabling statute is sufficient to grant local government the authority to enter into development agreements. There is some authority for requiring a local government to pass an enabling ordinance setting out the details of development annexation agreement procedures and requirements, although this requirement has so far been limited to development and/or agreements rather than annexation agreements. Thus, the Hawaii[239] and

234. *See* Santa Margarita Area Residents Together v. San Luis Obispo County, 100 Cal. Rptr. 2d 740, 743 (Ct. App. 2000) (upholding development agreement that froze zoning on the proposed development property in exchange for "the developer's commitment to submit a specific plan for construction in compliance with County land use requirements").

235. *Id.* at 747.

236. *See* Giger v. City of Omaha, 442 N.W.2d 182 (Neb. 1989).

237. *See supra* note 184.

238. Daniel J. Curtin, Jr., Address at the Institute on Planning, Zoning and Eminent Domain: Exactions, Dedications and Development Agreements Nationally and in California: When and How Do the *Dolan/Nollan* Rules Apply (Apr. 10, 2003), *available at* http://www.cacities.org/resource_files/23038.dan%20curtin%20exactions%20paper.pdf.

239. The Hawaii code provides:

> General authorization.
>
> Any county by ordinance may authorize the executive branch of the county to enter into a development agreement with any person having a legal or equitable interest in real property, for the development of such property in accordance with this part; provided that such an ordinance shall:

Florida[240] statutes appear to require that local governments desiring to negotiate development agreements first pass a local resolution or ordinance to that effect.

While the language of the Hawaii statute does not clearly require such an ordinance, three out of Hawaii's four counties have drafted them. According to attorneys in California, those California local governments that have executed development agreements have also passed such ordinances. Indeed, the recent amendments to the California statute—by making it mandatory that local governments pass such an ordinance at the request of landowners to ensure that there is a process available for negotiating such agreements—appear to make it very clear that such ordinances are a prerequisite.

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(1) Establish procedures and requirements for the consideration of development agreements upon application by or on behalf of persons having a legal or equitable interest in the property, in accordance with this part;

(2) Designate a county executive agency to administer the agreements after such agreements become effective.

(3) Include provisions to require the designated agency to conduct a review of compliance with the terms and conditions of the development agreement, on a periodic basis as established by the development agreement; and

(4) Include provisions establishing reasonable time periods for the review and appeal of modifications of the development agreement.

Negotiating development agreements.

The mayor or the designated agency appointed to administer development agreements may make such arrangements as may be necessary or proper to enter into development agreements, including negotiating and drafting individual development agreements; provided that the county has adopted an ordinance pursuant to section 46-123.

The final draft of each individual development agreement shall be presented to the county legislative body for approval or modification prior to execution. To be binding on the county, a development agreement must be approved by the county legislative body and executed by the mayor on behalf of the county. County legislative approval shall be by resolution adopted by a majority of the membership of the county legislative body.

HAW. REV. STAT. ANN. §§ 46-123 to -124 (LexisNexis 2003).

240. *See* FLA. STAT. ANN. § 163.3223 (West 2006) ("Any local government may, *by ordinance*, establish procedures and requirements, as provided in ss. 163.3220–163.3243, to consider and enter into a development agreement with any person having a legal or equitable interest in real property located within its jurisdiction.") (emphasis added).

2. Approval and Adoption

Although one governmental body may enter into the negotiation stage of the development agreement, another may be authorized to approve the final product. In Hawaii, for example, the mayor is the designated negotiator, with the final agreement presented to the county legislative body (city council) for approval.[241] If approved, the city council must then adopt the development agreement by resolution.[242] In California, a development agreement must be approved by ordinance.[243]

A development agreement may also be entered into early in the planning process.[244] In *SMART,* an association comprised of area residents contended that a development agreement entered into by San Luis Obispo County was invalid because the project in contention had not been approved for actual construction.[245] In rejecting this contention and holding for the county, the court stated that the development agreement statute should be liberally construed to permit "local government to make commitments to developers at the time the developer makes a substantial investment in a project."[246]

The court found that the agreement entered into by the county conformed to the statute because, by focusing on the planning state of the project, the agreement met rather than evaded the purpose of the statute.[247] The county's agreement maximized the public's role in final development, increased control over the inclusion of public facilities and benefits, and "permit[ted] the County to monitor the planning of

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241. The Hawaii code provides the following for negotiating development agreements:

> The mayor or the designated agency appointed to administer development agreements may make such arrangements as may be necessary or proper to enter into development agreements, including negotiating and drafting individual development agreements; provided that the county has adopted an ordinance pursuant to section 46-123.
>
> The final draft of each individual development agreement shall be presented to the county legislative body for approval or modification prior to execution. To be binding on the county, a development agreement must be approved by the county legislative body and executed by the mayor on behalf of the county. County legislative approval shall be by resolution adopted by a majority of the membership of the county legislative body.

HAW. REV. STAT. ANN. § 46-124.

242. *Id.* § 46-124.

243. *See* CAL GOV'T CODE § 65867.5 (West Supp. 2007).

244. *See* Santa Margarita Area Residents Together v. San Luis Obispo County, 100 Cal. Rptr. 2d 740 (Ct. App. 2000).

245. *Id.* at 742.

246. *Id.* at 746.

247. *Id.* at 745.

the Project to effectively assure compliance with [its] existing . . . land use regulations."[248]

3. Conformance to Plans and Other Reviews

Development agreements must often comply with local government plans as a condition of enforceability, either by statute or because of the rubric that the zoning bargained for must accord with comprehensive plans. The Hawaii[249] and California[250] development agreement statutes both so require. In California, the development agreement must be consistent "with the general plan and any applicable specific plan."[251] A fully negotiated development agreement is a "project" under the California Environmental Quality Act ("CEQA"), and as such is subject to environmental review.[252] This is true even when the development agreement is not directly approved by the local government but is instead submitted to the voters for approval.[253]

If, prior to incorporation of a new city or annexation to an existing city, a county has entered into a development agreement with the developer, the development agreement remains valid for the duration of the agreement, or for "eight years from the effective date of the incorporation or annexation, whichever is earlier," or for up to 15 years upon agreement between the developer and the city.[254] This statute applies to incorporations where the development agreement was applied for prior to circulation of the incorporation petition and entered into between the county and the developer prior to the date of the incorporation election.[255] The statute also allows the incorporating or annexing city to modify or suspend the provisions of the development

248. *Id.*

249. *See* HAW. REV. STAT. ANN. § 46-129 (LexisNexis 2003) ("No development agreement shall be entered into unless the county legislative body finds that the provisions of the proposed development agreement are consistent with the county's general plan and any applicable development plan, effective as of the effective date of the development agreement.").

250. *See* CAL. GOV'T CODE § 65867.5 (West Supp. 2007) ("(a) A development agreement is a legislative act which shall be approved by ordinance and is subject to referendum. (b) A development agreement shall not be approved unless the legislative body finds that the provisions of the agreement are consistent with the general plan and any applicable specific plan.").

251. *Id.* § 65867.5(b).

252. *See* California Environmental Quality Act, CAL. PUB. RES. CODE § 21065 (West 1996); Citizens for Responsible Gov't v. City of Albany, 66 Cal. Rptr. 2d 102, 111 (Ct. App. 1997) (interpreting "project").

253. *Citizens for Responsible Gov't*, 66 Cal. Rptr. 2d at 111. *See generally* California Environmental Quality Act, CAL. PUB. RES. CODE §§ 21000–21178.1 (West 1996).

254. CAL. GOV'T CODE § 65865.3(a) (West 1997).

255. *Id.* § 65865.3(c)(1)–(2).

agreement if it finds an adverse impact on public health or safety in the jurisdiction.[256] However, as to annexations, if the proposal for annexation "is initiated by a petitioner other than a city, the development agreement is valid unless the city adopts written findings that implementation of the development agreement would create a condition injurious to the health, safety, or welfare of city residents."[257]

The importance of the plan is demonstrated by the Idaho Supreme Court in *Sprenger, Grubb & Assocs., v. City of Hailey*.[258] There, the court upheld a rezoning over the objections of the developers of property subject to what the court called a development agreement (arguably an annexation agreement), on the ground that the applicable plan was sufficiently broad in that it supported the contested downzoning.[259] Largely to the same effect is a recent California Court of Appeals decision where the existence of, and need to conform to, applicable plans was critical in upholding a development agreement in the face of a broad and direct challenge to such agreements generally.[260]

4. The Legislative/Administrative Issue

One of the thorniest problems in land use regulation is whether the amendment or changing of such a regulation is legislative or quasi-judicial/administrative.[261] Legislative decisions like zoning amendments are subject to initiative and referendum, whereas quasi-judicial decisions like the granting of a special use permit, are not in many jurisdictions. Legislative decisions like rezonings are, when appealed, usually heard de novo whereas quasi-judicial decisions, like the granting of a special use permit, are decided on the record made before the permitting agency, usually under a state's administrative

256. *Id.* § 65865.3(b).

257. *Id.* § 65865.3(c)(3).

258. 127 Idaho 576, 903 P.2d 741 (1995).

259. *Id.* at 585, 903 P.2d at 750 ("The Council's conclusion that the 'downzoning' . . . is consistent with Hailey's comprehensive plan is not clearly erroneous, and is affirmed.").

260. *See* Santa Margarita Area Residents Together v. San Luis Obispo County, 100 Cal. Rptr. 2d 740 (Ct. App. 2000).

261. *See, e.g.*, Town v. Land Use Comm'n, 524 P.2d 84, 90–91 (Haw. 1974) (holding a reclassification of land by a state land use commission to be quasi-judicial); Fasano v. Bd. of County Comm'rs, 507 P.2d 23, 26 (Or. 1973) (holding a rezoning to be the same, despite the general rule that such "rezonings" are generally held to be legislative in character).

procedure code.[262] What about the development agreement? On this issue, California and Hawaii appear to differ—in the former, it is a legislative act,[263] whereas it is an administrative act in the latter.[264]

As with zoning, what follows from the statutory declarations—legislative in California, "quasi-judicial/administrative" in Hawaii—is more than a matter of form. Legislative decisions are subject to referendum.[265] Quasi-judicial ones may not be.[266] Given the common use of the referendum in both California and Hawaii[267] to address land use issues, development agreements in Hawaii, at least, are likely to be "referendum-proof," as well as protected against government change, during the life of a development agreement. However, California limits the opportunity to repeal a development agreement to thirty days from the date the local government approved the agreement.[268] Thereafter, both the agreement and the proposed land development are immune from subsequent changes by referendum.[269] Moreover, in *Midway Orchards*, a California court held a development agreement was invalid because the general plan amendment relied on for consistency was timely subject to a referendum.[270] The court stated:

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262. *See* JULIAN CONRAD JUERGENSMEYER & THOMAS E. ROBERTS, LAND USE PLANNING AND CONTROL LAW §§ 5.31, 5.33, 5.38 (1998); *see also* David L. Callies, Nancy C. Neuffer & Carlito P. Caliboso, *Ballot Box Zoning: Initiative, Referendum and the Law*, 39 WASH. U. J. URB. & CONTEMP. L. 53 (1991).

263. *See Santa Margarita Area Residents Together*, 100 Cal. Rptr. 2d at 744.

264. *See* HAW. REV. STAT. ANN. § 46-131 (LexisNexis 2003) ("Each development agreement shall be deemed an administrative act of the government body made party to the agreement.").

265. *See* CAL. GOV'T CODE § 65867.5 (West Supp. 2007) ("A development agreement is a legislative act . . . and is subject to referendum.").

266. *See* DAVID L. CALLIES & ROBERT H. FREILICH, CASES AND MATERIALS ON LAND USE 309 (1986); DONALD G. HAGMAN & JULIAN CONRAD JUERGENSMEYER, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW § 3.12 (2d ed. 1986). *But see* City of Cuyahoga Falls v. Buckeye Cmty. Hope Found., 538 U.S. 188, 199 (2003).

267. Land use initiatives, on the other hand, are illegal in Hawaii, largely on the ground that they are anti-planning. *See* Sandy Beach Def. Fund v. City Council of Honolulu, 773 P.2d 250 (Haw. 1989).

268. *See* Midway Orchards v. County of Butte, 269 Cal. Rptr. 796, 804–06 (Ct. App. 1990) (holding that where development agreements are approved by legislative act of resolution that do not include referendum mechanism, the constitutional right to referendum requires a thirty-day delay in effectiveness of the agreement to allow for referendum procedure).

269. *See* DANIEL J. CURTIN, JR., CURTIN'S CALIFORNIA LAND USE AND PLANNING LAW 189 (17th ed. 1997) ("A development agreement is . . . subject to repeal by referendum. However, the opportunity for such repeal expires 30 days after the city's adoption of . . . the agreement, and thereafter the project is immune to subsequent changes in zoning ordinances and land use regulations . . . inconsistent with those . . . in the agreement.").

270. 269 Cal. Rptr. 769.

> The development agreement was therefore unlawfully approved and executed. A contract entered into by a local government without legal authority is "wholly void," ultra vires, and unenforceable. Such a "contract" can create no vested rights. Therefore, Midway can claim no right to develop its property based on a development agreement void from the beginning.[271]

Since a development agreement is a legislative act, a local government's decision not to enter into a development agreement need not be supported by findings.[272]

Under the California development agreement statute, mutuality of consideration is not required.[273] As a practical matter, however, it is usually present as the developer obtains a "freeze" on applicable land use regulations while the public often obtains increased control over the development, certain assurances that the project will go forward, and perhaps other concessions from the developer that could not be obtained through the standard land use exaction process.

Finally, there is the question in California of whether the legislature can declare something to be a legislative act if it is not one anyway, even though this might "take away a right reserved in the California Constitution to the people of a city to rezone by initiative."[274] A California appellate court has declared that a development agreement is a legislative act.[275] This issue does not arise in Hawaii, both because the state constitution does not so provide, and because the Hawaii statute expresses a preference against such agreements being legislative acts.[276] Other states have decided the question in the courts alone.[277]

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271. *Id.* at 807 (citations omitted); *see also* 216 Sutter Bay Assocs. v. County of Sutter, 68 Cal. Rptr. 2d 492 (Ct. App. 1997) (holding that an interim urgency zoning ordinance and a parallel "ordinary" urgency ordinance, adopted by a newly elected board of supervisors within the 30-day "referendum period," successfully stopped a development agreement adopted by the preceding, lame-duck board).

272. Native Sun/Lyon Comtys. v. City of Escondido, 19 Cal. Rptr. 2d 344, 355 (Cal. Ct. App. 1993).

273. *See* CAL. GOV'T CODE § 65867 (West 1997).

274. Donald G. Hagman, *Development Agreements*, 3 ZONING AND PLAN. L. REP. 65 (1980).

275. Santa Margarita Area Residents Together v. San Luis Obispo County, 100 Cal. Rptr. 2d 740, 744 (Ct. App. 2000).

276. *See* HAW. REV. STAT. ANN. § 46-131 (LexisNexis 2003).

277. *See, e.g.*, Geralnes B.V. v. City of Greenwood Vill., 583 F. Supp. 830, 835 (D. Colo. 1984) (holding that city's zoning actions are quasi-judicial).

5. Public Hearing

Another issue that arises frequently is whether a public hearing is required before a development agreement can be entered into, and, if so, what proceedings are required. Both Hawaii[278] and California[279] explicitly require that a public hearing be held prior to adoption of the development agreement.

6. Binding of State and Federal Agencies

Hawaii and California diverge on another key point—the binding inclusion of state or federal agencies. Hawaii seeks to bind them;[280] California does not.[281] California initially appears to limit agreements to cities and counties, though it contemplates coastal commissions as parties under certain circumstances.[282] Hawaii, on the other hand,

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278. *See* HAW. REV. STAT. ANN. § 46-128 ("No development agreement shall be entered into unless a public hearing on the application therefor first shall have been held by the county legislative body.").

279. The California code provides:

> A public hearing on an application for a development agreement shall be held by the planning agency and by the legislative body. Notice of intention to consider adoption of a development agreement shall be given as provided in Section 65090 and 65091 in addition to any other notice required by law for other actions to be considered concurrently with the development agreement.

CAL. GOV'T CODE § 65867 (West 1997).

280. The Hawaii code provides:

> In addition to the county and principal, any federal, state, or local government agency or body may be included as a party to the development agreement. If more than one government body is made party to an agreement, the agreement shall specify which agency shall be responsible for the overall administration of the agreement.

HAW. REV. STAT. ANN. § 46-126(d).

281. The California code provides:

> A development agreement shall not be applicable to any development project located in an area for which a local coastal program is required to be prepared and certified pursuant to the requirements of Division 20 (commencing with Section 30000) of the Public Resources Code, unless: (1) the required local coastal program has been certified as required by such provisions prior to the date on which the development agreement is entered into, or (2) in the event that the required local coastal program has not been certified, the California Coastal Commission approves such development agreement by formal commission action.

CAL. GOV'T CODE § 65869.

282. *See id.*

appears determined to permit state and federal agencies in development agreements.[283]

7. Amendment or Cancellation of the Agreement

Generally, mutual consent of both parties is needed to amend or cancel the agreement.[284] In Hawaii, if the proposed amendment would substantially alter the original agreement, a public hearing must be held.[285] In California, a local government may terminate or modify a development agreement if it "finds and determines, on the basis of substantial evidence, that the applicant or successor in interest thereto has not complied in good faith with terms or conditions."[286]

8. Breach

There are essentially two kinds of breaches that commonly occur during the period of an agreement: change in land use rules by local government and failure to provide a bargained-for facility, dedication, or hook-up by either party.

a. When Local Government Changes the Land Development Rules

Recall that the overriding concern of the landowner in negotiating a development agreement is the vesting of development rights or the freezing of land development regulations during the term of the agreement. Whether these regulations are changed just prior to the execution of the agreement, and whether the landowner may need further permits which are not subject to a particular agreement, raise different, but related, questions. Here, we deal only with the effect on the landowner and the agreement should the local government change development regulations during term of the agreement. Development agreement statutes usually contemplate such a freeze.[287]

283. *See* HAW. REV. STAT. ANN. § 46-126(d).

284. *See* CAL. GOV'T CODE § 65868 ("A development agreement may be amended, or canceled in whole or in part, by mutual consent of the parties to the agreement or their successors in interest."); HAW. REV. STAT. ANN. § 46-130 ("A development agreement may be amended or canceled, in whole or in part, by mutual consent of the parties to the agreement, or their successors in interest . . . .").

285. *See* HAW. REV. STAT. ANN. § 46-130 ("[I]f the county determines that a proposed amendment would substantially alter the original development agreement, a public hearing on the amendment shall be held by the county legislative body before it consents to the proposed amendment.").

286. CAL. GOV'T CODE § 65865.1.

287. For example, the California code provides:

Thus, the California Supreme Court, in *City of West Hollywood v. Beverly Towers*, made it abundantly clear in a footnote that landowner protection from development regulation changes is a major factor in executing development agreements:

> [D]evelopment agreements . . . between a developer and a local government limit the power of that government to apply newly enacted ordinances to ongoing developments. Unless otherwise provided in the agreement, the rules, regulations, and official policies governing permitted uses, density, design, improvement, and construction are those in effect when the agreement is executed.[288]

The purpose of a development agreement, said the court, was "to allow a developer who needs additional discretionary approvals to complete a long-term development project as approved, regardless of any intervening changes in local regulations."[289]

The few courts that have dealt with local government changes in land use regulations have no difficulty in finding them inapplicable to the property subject to the agreement, provided the agreement itself is binding. Thus, in *Meegan v. Village of Tinley Park*, the Illinois Supreme Court held that the original zoning of the subject property was valid during the term of the annexation agreement and any change by the Village was void during that time.[290] Indeed, since the Village's at-

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> Unless otherwise provided by the development agreement, rules, regulations, and official policies governing permitted uses of the land, governing density, and governing design, improvement, and construction standards and specifications, applicable to development of the property subject to a development agreement, shall be those rules, regulations, and official policies in force at the time of execution of the agreement. A development agreement shall not prevent a city, county, or city and county, in subsequent actions applicable to the property, from applying new rules, regulations, and policies which do not conflict with those rules, regulations, and policies applicable to the property as set forth herein, nor shall a development agreement prevent a city, county, or city and county from denying or conditionally approving any subsequent development project application on the basis of such existing or new rules, regulations, and policies.

CAL. GOV'T CODE § 65866.

288. 805 P.2d 329, 334 n.6 (Cal. 1991); *see also* Daniel J. Curtin, Jr., *Protecting Developers' Permits to Build: Development Agreement in Practice in California and Other States*, 18 ZONING & PLAN. L. REP. 85, 85–92 (1995) (discussing various tests for determining when a developer's rights have vested and local government is estopped "from enacting or applying subsequent zoning changes to prevent the completion of the project or substantially reduce the return upon the developer's investment").

289. *Beverly Towers*, 805 P.2d at 334–35.

290. 288 N.E.2d 423, 426 (Ill. 1972).

tempted zoning change was void, said the Court, there was effectively no breach by the Village.[291]

On the other hand, careful drafting is necessary to avoid the later application of land development regulations of a different sort than those contemplated in the agreement. Thus, in the California case of *Pardee Construction Co. v. City of Camarillo*, the court held that, according to the agreement between Pardee and the city, Pardee had the right to develop according to the city's "masterplan"; and because any changes to the "masterplan" affected all developers in the city, the changes in the ordinance were applicable to Pardee.[292] While this seems to require a certain amount of prescience from the landowner at first blush, a local government can hardly be estopped from exercising its police power in enforcing a new breed of land development regulations that were not contemplated years before by either party, under the exercise of its police power. *Country Meadows West Partnership v. Village of Germantown* represents an entirely different perspective. The court struck down the Village's imposition of a new impact fee against a subdivider, holding that because of the subdivision agreement between the Village and the subdivider "the Village [could]not . . . demand additional impact fees at the time Country Meadows applies for a building permit."[293]

Most development agreement statutes either contain a limitation on the duration of such agreements,[294] or provide that the agreement must recite one.[295]

b. Nonperformance of a Bargained-for Act: Dedications, Contributions, and Hook-ups

Equally common is the failure of a landowner or local government to live up to the other terms of the agreement, generally by fail-

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291. *See id.*; *cf.* Cummings v. City of Waterloo, 683 N.E.2d 1222, 1230 (Ill. App. Ct. 1997) (holding the city's amendment to its zoning ordinance that was contrary to the provisions of an annexation agreement unenforceable against property subject to the annexation agreement).

292. 690 P.2d 701, 705–06 (Cal. 1984).

293. 2000 WI App 127, ¶¶ 20–21, 614 N.W.2d 498, 503 (Wis. Ct. App. 2000).

294. *See, e.g.*, 65 ILL. COMP. STAT. ANN. 5/11-15.1-1 (West 2005) ("The agreement shall be valid and binding for a period of not to exceed 20 years from the date of its execution."); *id.* 5/11-15.1-5 ("Any annexation agreement executed prior to October 1, 1973 . . . is hereby declared valid and enforceable as to such provisions for the effective period of such agreement, or for 20 years from the date of execution thereof, whichever is shorter.").

295. *See, e.g.*, CAL. GOV'T CODE § 65865.2 (West 1997) ("A development agreement shall specify the duration of the agreement . . . ."); HAW. REV. STAT. ANN. § 46–126(a)(4) (LexisNexis 2003) ("A development agreement shall . . . [p]rovide a termination date . . . .").

ing to provide a public facility or money therefor, or by refusing to provide utility services to the subject property.[296] Under such circumstances, the courts have been strict in forcing the parties to live up to their bargains, even when unusual difficulties would appear to render such performance nearly impossible. Thus, in the California case of *Morrison Homes Corp. v. City of Pleasanton*, the court of appeals directed the local government to provide sewer connections to the landowner's property, as agreed in an annexation agreement, even though a superior governmental entity, a state regional water quality control board, ordered the local government not to do so.[297] After deciding that the agreement did not amount to the city's illegally contracting away its police power, the court stated: "The onset of materially changed conditions is not a ground for voiding a municipal contract which was valid when made, nor is the contracting city's failure to have foreseen them."[298]

E. Limits on Local Government Conditions, Exactions, and Dedications Pursuant to Development Agreements

While every governmental action must be invested with a public purpose, there are few conditions, exactions, or dedications that a local government may not legitimately bargain for in negotiating such agreements. Certainly, local governments may require landowners and developers to make reasonable contributions toward whatever services and other resources the government will need to provide as a result of an annexation or development.[299] But this is so under existing law on development conditions and exactions entirely apart from

296. For other items bargained for and litigated, see *People ex rel. Van Cleave v. Village of Seneca*, 519 N.E.2d 63, 64 (Ill. App. Ct. 1988) (exemptions from real estate taxes), and *People ex rel. O'Malley v. Village of Ford Heights*, 633 N.E.2d 848, 849 (Ill. App. Ct. 1994) (exemption from environmental ordinances, which did not survive legal challenge).

297. 130 Cal. Rptr. 196, 200, 203–04 (Ct. App. 1976). *But cf.* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 492, 506 (1987) (upholding governmental refusal to perform a development agreement when health and safety issue is involved); Goldblatt v. Town of Hempstead, 369 U.S. 590, 593–94 (1962).

298. *Morrison Homes Corp.*, 130 Cal. Rptr. at 202.

299. *See, e.g.*, Vill. of Orland Park v. First Fed. Sav. & Loan Ass'n, 481 N.E.2d 946, 950 (Ill. App. Ct. 1985) ("Additional positive effects of such agreements include controls over health, sanitation, fire prevention and police protection, which are vital to governing communities.").

such agreements.[300] The question is whether the local government may go further since the development agreement is in theory a voluntary agreement which neither government nor landowner is compelled to either negotiate or execute. So long as the agreement is in fact voluntary, the answer is almost certainly yes.[301]

Whether or not development agreements successfully avoid or survive nexus and proportionality challenges may depend, however, upon how willing the courts are to accept the underlying "voluntary" rationale.

The argument has been made that exactions agreed to under a voluntary development agreement must bear a rational nexus to the needs created by the development.[302] The argument states that the "rational nexus" and "substantial advancement" standards of *Nollan* are not limited to just those instances where the municipality requires an exaction from an uncooperative landowner, but also apply to voluntary permit conditions. Under this view, the type and extent of exactions permissible under development agreements would not differ from the type and extent available under other traditional exaction mechanisms such as impact fees.

The rationale supporting such a view is that requiring the *Nollan* standard to be satisfied serves to prevent governmental abuse of the mechanism, as it is "difficult to tell whether a landowner's acceptance

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300. *See* Callies, *supra* note 132; *see also* Dolan v. City of Tigard, 512 U.S. 374, 391 (1994) (holding that the Takings Clause of the Fifth Amendment requires that "the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development"); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 834–35 (1987) ("We have long recognized that land-use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests' and does not 'den[y] an owner economically viable use of his land.' . . . [A] broad range of governmental purposes and regulations satisfies these requirements.") (internal citations omitted).

301. *See* City of Annapolis v. Waterman, 745 A.2d 1000, 1025 (Md. 2000) (holding that conditions agreed to by the subdivider as part of an earlier subdivision agreement were not an unconstitutional taking of the subdivider's property). For a contrary view, which would impose the same strict nexus and proportionality requirements upon such agreements as upon "freestanding" local government development dedications, exactions, and other conditions, see generally Sam D. Starritt & John H. McClanahan, Comment, *Land-use Planning and Takings: The Viability of Conditional Exactions to Conserve Open Space in the Rocky Mountain West After* Dolan v. City of Tigard, *114 S. Ct. 2309 (1994)*, 30 LAND & WATER L. REV. 415 (1995).

302. *See* Michael H. Crew, *Development Agreements After* Nollan v. California Coastal Commission, *483 U.S. 825 (1987)*, 22 URB. LAW. 23, 27 (1990) ("In applying this standard, courts considered . . . the cost of existing public facilities and their manner of financing, the extent to which existing development has already contributed to the cost of these facilities, and the extent to which the proposed project will contribute to the cost of the existing facilities in the future.").

of a condition is truly voluntary or is instead a submission to government coercion."[303] Thus:

> A municipality could use . . . regulations to exact land or fees from a subdivider far out of proportion to the needs created by his subdivision in order to avoid imposing the burden of paying for additional services on all citizens via taxation. To tolerate this situation would be to allow an otherwise acceptable exercise of police power to become grand theft.[304]

The Hawaii development agreement statue provides that, "Public benefits derived from development agreements may include, but are not limited to, affordable housing, design standards, and on- and off-site infrastructure and other improvements. Such benefits may be negotiated for in return for the vesting of development rights for a specific period."[305] According to one commentator:

> [T]he government can require the developer to provide public benefits unrelated to the proposed project in exchange for the municipality granting her the right to develop . . . . [T]he statute leads municipalities to believe that the granting of development rights confers a governmental benefit on the developer. This is not the case. *Nollan* clearly holds that "the right to build on one's own property—even though its exercise can be subjected to legitimate permitting requirements—cannot remotely be described as a "'governmental benefit.'"[306]

However, while it is true that the right to develop on one's own land is not a governmental benefit, the right to develop is not the bargaining chip that is tendered by the government in a development agreement. The authorities cited in support of the above-quoted argument concern exactions imposed as required conditions to development.[307] In the case of a development agreement, the municipality is not granting the landowner the right to develop nor imposing conditions on such development, but instead promising to protect the de-

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303. *Id.* at 46.

304. Collis v. City of Bloomington, 246 N.W.2d 19, 26 (Minn. 1976) (upholding a statute authorizing municipalities to require dedication of land or payment of fees as condition of subdivision approval as constitutional since the enabling legislation and implementing ordinance limited the amount of land to be dedicated to a "reasonable" percentage of the property).

305. HAW. REV. STAT. ANN. § 46-121 (LexisNexis 2003).

306. Crew, *supra* note 302, at 49 (quoting *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 833 (1987)).

307. *See* Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984); Bowen v. Gilliard, 483 U.S. 587, 605 (1987).

veloper's investment by not enforcing any subsequent land-use regulation that may burden the project. The developer does not require any such guarantee to exercise his right or privilege to build, and may certainly choose to avail himself of such a guarantee and to negotiate for it. It could be argued that the development agreement does indeed convey a "governmental benefit" upon the developer, since "[i]t is well established that there is no federal Constitutional right to be free from changes in land use laws."[308] The municipality should therefore be free to negotiate its best terms in exchange for the benefit conferred, regardless of nexus. Because development agreements are adopted as a result of negotiations between a local government and a developer, they are not subject to the *Dolan* or *Nollan* decisions.[309]

In *Hermosa Beach Stop Oil Coalition v. City of Hermosa Beach*,[310] the court held that the developer, who had failed to establish entitlement to vested rights to develop an oil business on property leased from the city, could have protected itself from later regulatory amendments by asking that the city enter into a development agreement.[311] The court noted that it was likely that the city would have demanded additional consideration for either a risk-adjustment provision in the existing lease or a separate development agreement, and that "[h]aving at least implicitly decided to forego such protection against future regulatory change, [the developer] must accept the consequences of its judgment to do so."[312]

In another California case, the trial court held that the developers' rights vested at the time of signing development, and thus the city could not use wording within the agreement to allow it to raise sewer connection fees.[313] Developers and the city entered into a 15-year written agreement allowing for the development of a residential subdivision, allowing the city to charge any "new taxes, assessments or development impact fees on the implementation of the Project" only if those same charges are levied on all other similar developments within the city.[314] Six years after the parties signed the contract, the city raised the monthly wastewater connection fees and initial capital

308. Lakeview Dev. Corp. v. City of South Lake Tahoe, 915 F.2d 1290, 1295 (9th Cir. 1990).

309. *See* Leroy Land Dev. Corp. v. Tahoe Reg'l Planning Agency, 939 F.2d 696, 698–99 (9th Cir. 1991) (holding settlement agreement not subject to *Nollan*); *see also* Callies & Tappendorf, *supra* note 181.

310. 103 Cal. Rptr. 2d 447 (Ct. App. 2001).

311. *Id.* at 464.

312. *Id.*

313. Operating Eng'rs Funds, Inc. v. City of Thousand Oaks, No. B137879, 2002 WL 44253, at *3 (Cal. Ct. App. Jan. 14, 2002) (holding that because the plaintiffs did not succeed in each of its claims, they could not qualify for attorney fees).

314. *Id.* at *1.

surcharge for each residential unit during the period covered by the contract, and the developers sued for breach of contract because their development rights had vested at the time of the initial agreement. The trial court agreed, but said that plaintiffs could not challenge the increased costs for potential future homeowners.[315]

In *City of North Las Vegas v. Pardee Construction Co. of Nevada*, a developer lost the appeal to define a cost-based fee as an impact fee in order to invalidate it through the parties' development agreement, which only prohibited impact fees.[316] The municipality in that case regulated water issues on a regional level, and to respond to Nevada's growth spurt, the region passed a capital improvements plan to supplement the existing, overstrained water supply system.[317] The city had to join the regional water authority because its own water supply did not accommodate for any more growth. Upon joining, the city had to pay for the connection to the new system through city-wide assessments and water delivery, connection and commodity fees.[318] To meet these payments, the city passed the costs on to the consumers at a direct rate—not making any profit.[319] Plaintiffs contended that these new charges were really impact fees and violated the terms of their development agreement.[320] Because the city does not make a profit—it instead bases the charges on those charges it must pay to the regional authority, with no money going toward capital improvements—the court found that the charge was simply cost-based and within the parameters of the development agreement.[321]

Courts regularly label sewer systems as a typical government function, but consider general water and storm water systems to be proprietary. Thus, in balance, a development agreement often provides that the subdivision developer install the water and sewer lines needed both within the subdivision and to connect the subdivision to extant lines. Sometimes the development agreement also requires payments for upgrades to the city's water facilities to manage the greater flow requirements of the new development. In return for the improvements, the city agrees to maintain the pipe infrastructure within and connected to the subdivision.

315. *Id.* at *2.
316. 21 P.3d 8 (Nev. 2001).
317. *Id.* at 8–9.
318. *Id.* at 9.
319. *Id.* at 10.
320. *Id.*
321. *Id.* at 11.

IV. CONCLUSION

Land development conditions and development agreements provide a realistic way for local governments to provide adequate public facilities and services to its citizens. By requiring developers to shoulder a major share of the cost of infrastructure, residential, commercial, and/or industrial growth will not outpace important public services like water, sewage, roads, schools, and parks.

Exactions, dedications, in-lieu or impact fees can be used to fund new infrastructure if local governments follow the necessary judicial and/or legislative guidelines. First, there must be an essential nexus between the land development conditions and what the developer proposes to do with the property.[322] Second, there must be at least a proportionally reasonable relationship between the land development condition and the need or problem which the development is expected to cause.[323] This need or problem must be evidenced by "some sort of individualized determination that the required dedication is related both in nature and extent to the proposed development's impact."[324] Government must determine the cost of the proposed facilities and the calculation of fees must be carefully determined in order to avoid a regulatory taking or unlawfully imposed tax. Many local governments adopt ordinances to set the rate or schedule of fees or, in the alternative, the developer is permitted to determine its own fee by demonstrating that its share is less than the fee set by the ordinance.[325] Boise's recent exercises in growth management strategies[326] provide in some measure for such fees and exactions, as Professor Robert Freilich reports in his spring growth management symposium remarks which will appear in a subsequent edition of the law review.

A validly executed development agreement avoids the requirements of both nexus and proportionality because it is consensual, thereby allowing a local government to exact more from a developer than it would otherwise be constitutional However, to be valid, a development agreement should be drafted in accordance with an enabling statute. Idaho's case law with respect to such agreements is particularly strict and so statutory authority would be particularly helpful.[327]

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322. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 836–37 (1987).

323. *Dolan v. City of Tigard*, 512 U.S. 374, 390 (1994).

324. *Id.* at 375.

325. Home Builders & Contractors Ass'n of Palm Beach County v. Bd. Of County Comm'rs, 446 So. 2d 140, 145 (Fla. Dist. Ct. App. 1983).

326. *See, e.g.*, PLANNING WORKS, LLC & PAUL, HASTINGS, JANOFSKY & WALKER, BLUEPRINT FOR GOOD GROWTH: PRELIMINARY DISCUSSION DRAFT May 17, 2006.

327. Sprenger, Grubb & Assocs., Inc. v. City of Hailey, 127 Idaho 576, 903 P.2d 741 (1995).